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**SELECTED CASES
ON CONTRACTS**

PIERSON AND CALLENDER

(SECOND EDITION)

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SELECTED CASES ON CONTRACTS

ARRANGED FOR

The use of Students of Business Law

— BY —

WARD W. PIERSON

of the Philadelphia Bar

Assistant Professor in Business Law

— AND —

CLARENCE N. CALLENDER

of the Philadelphia Bar

Instructor in Business Law

**WHARTON SCHOOL
UNIVERSITY OF PENNSYLVANIA**

SECOND EDITION

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CLARENCE N. CALLENDER
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PREFACE

SECOND EDITION

THROUGH the courtesy of the American Law Book Company, the editors are able to present, as an Appendix, a comprehensive outline of the Law of Contracts as it appears in Cyc. This analysis is reproduced subject to the copyright of the American Law Book Company.

A few of the cases in the first edition have been replaced by decisions that are more concise and more clearly illustrative of certain of the principles involved in Business Law. A number of footnotes have been introduced to cover new points.

September 1, 1912.

WARD W. PIERSON,
CLARENCE N. CALLENDER.

PREFACE

FIRST EDITION

THIS CASE BOOK has been prepared for the special use of students taking a course in Business Law in Universities and Colleges. It is not intended for lawyers nor for students in law schools. Its immediate purpose is to supply a set of convenient working models for those about to enter business. The mere study of a text book on Business Law by such men is often nothing more than a mere memory exercise. The study of the cases submitted herewith will give, it is hoped, not only an increased facility in meeting the everyday legal problems that so often confront the business man, but also, by giving a concrete instance in point, will arouse a keener interest and therefore make a greater impression.

In many of the cases we have thought it advisable to abridge the statement of facts. This has been done without calling attention to the matter. Portions of opinions on points irrelevant to the subject illustrated are omitted. These omissions are indicated. Wherever, in the course of the opinion of the Court, a group of authorities are cited, these citations are abridged. The case books on Contracts prepared by Keener, and by Huffcut and Woodruff, have been of much assistance to us, and acknowledgment is made therefor.

This volume is dedicated to all those who may find the ensuing pages useful.

October 1, 1911.

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PART I

FORMATION OF CONTRACTS

Chapter I

OFFER AND ACCEPTANCE

Express and implied contracts

HERTZOG v. HERTZOG,
29 Pa. 465 (1857).

This suit was brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his lifetime, and for money lent. The plaintiff was 21 years of age about the year 1825, but continued to reside with his father, and to work for him on the farm until 1842. He then left his father, who put him on another farm which the father owned. Sometime afterwards the father and his wife moved into the same house with John and continued to reside there until the death of the father in 1849.

The following testimony was relied upon to prove a contract or agreement on the part of the father, George Hertzog, to pay for the services of the plaintiff. Adam Stamm affirmed, "John labored for his father; all worked together. The old man got the proceeds. I know the money from the grain went to pay for the farm—the old man said so. John's services worth \$12 per month; the wife's worth \$1 per week, beside attending to her own family. I heard the old man say he would pay John for the labor he had done."

Daniel Roderick, sworn: "John Hertzog requested him to see his father about paying him for his work, which he

had done and was doing, and stated, that he had frequently spoken to the old man, his father, about it, and he had still put him off; he agreed to see him, and thinks it was in June, 1849. Coming from Duncan's Furnace I spoke to the old man about paying John for his work. He said he intended to make John safe. John spoke to me in the spring, 1848; the old man died in August, 1849, I think."

The question involved in this case was whether the above testimony is sufficient to prove an agreement on the part of the father to pay for the services of the son.

LOWRIE, J.: "Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making: as, to deliver an ox or 10 loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which therefore the law presumes that every man undertakes to perform. As if I employ a person to do any business for me or perform any work, the law implies that I undertook and contracted to pay him as much as his labor deserves. If I take up wares of a tradesman without any agreement of price the law concludes that I contracted to pay their real value."

This is the language of Blackstone (2 Comm. 443), and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an *express* one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

We have in law three classes of relation, called contracts.

1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts.

In the present case there is no pretense of a constructive contract, but only of a proper one, either express or implied.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and, therefore, by common custom, compensation is mutually counted on in one case, and in the other not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family, even after

they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and very seldom because their father desires to use them as hired servants.

We concede that in a case of this kind an express contract may be proved by indirect or circumstantial evidence. If the parties kept accounts between them these might show it, or it might be sufficient to show that money was periodically paid to the son as wages; or, if there be no creditors to object, that a settlement for wages was had, and a balance agreed upon. But there is nothing of the sort here. These witnesses (Stamm and Roderick) add nothing to the facts already recited, except that the father told them shortly before his death, that he intended to pay his son for his work. This is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward from his father, but not that he had a contract for any.

The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connections on their own terms and to be judged accordingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen.

New trial awarded.

COLUMBUS, ETC. RAILWAY CO. *v.* GAFFNEY,
65 Ohio 104 (1901).

The plaintiff had a contract with the Government by which for a compensation he was bound to carry the mails between the post office at Lancaster, Ohio, and the depot of the Columbus, etc. Railway Co., and the depot of the Cincinnati, etc. Railway Co. at that place. These two roads at this point form a junction, the roads running on opposite sides of the common depot within 40 feet of each other. Each of these roads had a contract with the Government for carrying mails over its roads by which each was required to transfer the mails over its road to that of the other when required in the course of transit. During the entire period for which compensation was claimed the work of transferring from one road to the other was performed by the plaintiff or his assignor. The plaintiff during this time supposed that it was his duty under his contract with the Government in regard to carrying the mails between the depots and the post office to make this transfer between the two roads, and performed the service under this impression until he was informed by an agent of the Government that it was not his duty and was ordered to desist from so doing. No demand for compensation was made until he had received this order from the Government agent, and he at no time prior thereto supposed that he was entitled to any compensation; nor was there any expressed request on the part of the company or its agents that he should perform this service, the company having agents of its own at the depot who should have performed the service.

On this state of facts it is claimed that a contract should be implied on the part of the defendant to pay the plaintiff what his services were reasonably worth in so transferring the mails for the defendant at the depot.

MINSHALL, C. J.: It seems clear that no contract can be inferred from the facts in this case for it does not appear

from anything in the case that the plaintiff performed the services for which he sues under a contract with the defendant whereby it was agreed between them that he should be compensated for his services by the defendant in any sum. There could have been no meeting of the minds on any of its terms, and without it no contract can exist whether expressed or implied. During all this time, some six years, in which he was engaged in doing the work, the plaintiff supposed that it was his duty to do it under his contract with the Government. He did not therefore during the time regard himself as performing any services for the defendant and made no claim against it for compensation until after he had been informed that it was not his duty to do what he had been voluntarily doing. This fact negatives the existence of any contract express or implied having existed between the parties during the time the services were being performed. The minds of the parties could not have met on the subject of compensation when the party doing the work had no idea that he was to be compensated by the defendant at the time the work was done. Under such circumstances the understanding of the party for whom the work was done becomes immaterial unless it had been so communicated to the other party as to have induced the performance of the services, which was not the case, if it had any such understanding, but there is nothing in the case to show any such understanding on the part of the Company. It is true that under its [railroad] contract with the Government it appears that the transfer of mails from its road to the other was one of its obligations, and the plaintiff in attending to the matter performed a service that it through its agents should have performed, but no request of the Company is here shown by implication; since the Company had agents of its own at the depot and the plaintiff in doing what he did performed services that should have been attended to by the employees of the Company. And had any claim been made by the plaintiff for compensation, or had the circumstances indicated that he

would make such a claim, doubtless the Company would have directed its own agents to attend to the business. This shows that there was nothing in the conduct of the plaintiff that indicated a purpose on his part to make a claim for compensation at the time the work was performed, and that the Company did not regard itself as receiving services from him for which it was to make compensation. In no view of the case then can the suit of the plaintiff be maintained against the Company on the ground of an implied contract to pay what the services were reasonably worth.

Judgment reversed; judgment for defendant.

Necessity for offer and acceptance

POTTS *v.* WHITEHEAD,
23 N. J. Eq. 512 (1873).

WOODHULL, J.: The appellant, Potts, seeks to enforce specific performance of an alleged agreement in writing for the sale of land. To show the agreement two separate writings were relied on: the first an offer to sell dated December 7, 1865, to be accepted within 30 days from date, signed by the respondent; and the other a letter dated January 3, 1866, written by the appellant accepting as he alleges the offer of December 7th. The principal questions discussed before us were: 1. Whether the letter of January 3rd amounted to a legal acceptance of the respondent's offer; 2. Whether it was properly communicated to the respondent; and 3. Whether admitting its sufficiency as an acceptance, and that it was properly sent so as to bind the respondent, the contract resulting from it is not too uncertain and incomplete in its terms to be enforced by the court of equity.

As a mere proposal or offer to sell, cannot become an agreement without being accepted, and as it is not claimed

that the offer in this case was accepted otherwise than by the letter of January 3rd, it follows that if that letter did not amount to an acceptance there was no agreement at all between these parties, and of course nothing on which the appellant's case can stand.

As to what are in general the characteristics of a good acceptance there seems to be very little difference of opinion.

An acceptance to be good must of course be such as to conclude an agreement or contract between the parties, and to do this, it must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. *Huddleston v. Briscoe*, 11 Ves. 583.

If the letter of January 3rd had contained simply the words "I accept your offer," or "I accept the terms proposed by you," or any other words of like import referring distinctly to the writing of December 7th, and had stopped there it would without doubt have been a good acceptance.

Common Intention

THOMAS *v.* GREENWOOD ET AL.

69 Mich. 215 (1888).

Error.

In reply to a general letter of inquiry from the plaintiff the defendants wrote as follows:

"DULUTH, MINN., Feb. 11, 1886.

"MR. H. H. THOMAS,

"9 Munger Block,

"Bay City, Mich.

"Dear Sir:—We are just in receipt of yours of the 9th instant in reference to Hercules Powder. Replying, would say that we have the following in stock: 600 lbs. No. 2 $\frac{3}{4}$ inch; 2800 lbs. No. 2, 1 $\frac{1}{4}$ inch; 2600 lbs. No. 2 S. 1 $\frac{1}{2}$ inch; 1150 lbs No. 2 S. S. 1 $\frac{1}{4}$ inch; 1550

lbs. No. 1 X. X. $1\frac{1}{4}$ inch. Of this we would like to reserve about 1500 lbs. Our Mr. Mundy, who was talking with you is not at home, and is bumming around the country in the cant-hook business. We quote this powder to you at 10 cents per pound f. o. b. here, we to reserve about amount stated. We also quote 4 x caps (see enclosed circular) which we are told are the best caps made, at \$5.90 per thousand. Fuse, Lake Superior Mining, single and double tape, at 20 per cent. off Toy & Bickford Company's or Aetna Powder Company's list. Terms, cash or approved notes. Should you decide to order these goods you may give us endorsed note that we can use the same as cash, dated March 1st, four months, without interest.

"Hoping to receive your order, we remain,

"Yours truly,

"G. C. GREENWOOD & CO."

Upon receipt of the above communication plaintiff wrote Greenwood & Co. as follows:

"BAY CITY, MICH., February 15, 1886.

"Messrs. G. C. GREENWOOD & Co.,

"Duluth, Minn.

"Gentlemen:—Your letter or statement showing amount of Hercules Powder to hand, showing 8700 lbs. I will take 7200 lbs. of same, leaving you the 1500 lbs. in reserve, as you wished; so please ship promptly by freight.

1900 lbs. No. 2 S. $1\frac{1}{4}$ inch Hercules
2600 lbs. No. 2 S. $1\frac{1}{4}$ inch Hercules
1150 lbs. No. 2 S. S. $1\frac{1}{4}$ inch Hercules
1550 lbs. No. 1 X. X. $1\frac{1}{4}$ inch Hercules
\$720.00

"Please ship above goods at once, and on receipt of invoice will forward endorsed note due four months from March 1, 1886. I do not understand what grade No. 4 x is. I use Tupper force caps of same brand in my trade here. You are too high on caps and fuse.

"Respectfully,

"H. H. THOMAS."

The defendant did not ship the goods as requested, and the plaintiff brings this action to recover his damages based upon the alleged contract.

Counsel for the defendants insist that the minds of the parties never met because:

First.—The offer is indefinite and left two matters open for further consideration, namely, the grade and quantity of each grade of the 1500 pounds of powder to be reserved by Greenwood & Co.; also the sufficiency of the note to be accepted in payment of the goods.

We think the position of the counsel for defendants is correct. The right to select powder reserved is clearly implied in the reservation. It applied to one grade no more than to another, and the fact the price at which the whole quantity was offered being a uniform price of 10 cents a pound, made no difference with the exercise of this right.

They did not agree to take any endorsed note plaintiff might send. Quality was essential. It was to be such a note as they could use the same as cash. Who was to pass upon this qualification? Not the one who gave the note, but they who received it. But the plaintiff annexed a new condition. It was this: "On receipt of invoice will forward endorsed note."

Second.—The offer is for the sale of powder, and of the caps and fuse. The offer is, "Should you decide to order these goods." The acceptance is of the powder only.

We think this point is well taken. Caps and fuse cannot be used without powder. Would it be likely that defendants would offer to sell nearly all of their powder without trying to sell also the caps and fuse? They made their price on each class of goods offered, and then said, "Should you decide to order these goods." Had plaintiff considered the price for the powder high, and the caps or fuse low, we do not think he could accept or order the caps or fuse alone without the further assent thereto of defendants. Offers of this kind become binding only when the proposition is met with an acceptance which corresponds with it entirely and adequately, without qualification or the addition of new matter. 1 Pars. Cont. (7th Ed.) We do not think this has been done in this case.

The judgment is affirmed.

Offer must be definite

SHERMAN v. KITSMILLER, ADM.,
17 S. & R. (Penna.) 45 (1827).

Writ of error to Court of Common Pleas. Plaintiffs in error were plaintiffs below.

George Sherman, deceased, promised Mrs. Sherman, plaintiff, his niece, that he would give her 100 acres of land if she would live with him and keep house for him until her marriage. Relying upon this promise, the plaintiff had kept house for him until the time of her marriage. The defendant requested the court among other things to charge the jury that the promise proved was too indefinite to exist. It was 100 acres of land without describing where it lay or of what value it should be, how it was to be laid off or by whom.

DUNCAN, J.: The error assigned is, that part of a long charge in which the court said, "There can be no recovery, unless there was a legal promise, seriously made; if a promise is so vague in its terms as to be incapable of being understood, and of being carried into effect, it cannot be enforced. If George Sherman had reference to no particular lands, if he did not excite or intend to excite a hope or expectation in Elizabeth Koons, that after her marriage with George S. Sherman she should get any land, such promise would not be so perfect as to furnish the ground of an action for damages. But if George Sherman was seized of several tracts in the vicinity, and he promised her one hundred acres, in such a manner as to excite an expectation in her that it was a particular part of his lands so held by him, though not particularly describing or specifying its value, or by whom; and if, in pursuance of such promise, she did marry George Sherman, then the action might be sustained."

Now let us put the case of the plaintiffs in the most favorable light, without regarding the form of the declaration, and admit that the proof met the allegation, the special

promise of the one hundred acres of land, the consideration of the promise, marriage, and its execution, and living with the defendant's intestate until the marriage, the charge of the court was, in the particular complained of, more favorable to the plaintiffs than their case warranted. It should have been, on the question put to the court, that the promise could not support the action; that the defendant's intestate did not assume to convey any certain thing, to convey any certain or particular land, or that could, with reference to anything said by him, refer to anything certain. Whereas the court submitted to the jury whether it did refer to anything certain, viz., lands of the intestate in the vicinity; and that without one spark of evidence to authorize the jury to make such an inference or draw such conclusion. * * * Express promises or contracts ought to be certain and explicit, to a common intent at least. * * * Now here, the court instructed the jury, that if they could find this promise to refer to anything certain, any land in particular, the action could be maintained. This was leaving it to the jury more favorably for the plaintiffs than ought to have been done; for the jury should have been instructed, that as there was nothing certain in the promise, nothing referred to, to render it certain, the action could not be maintained. The contract was an express one,—nothing could be raised by implication,—no other contract could be implied. * * *

There would in the present case be no specific performance decreed in a court of chancery; the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give him 100 pieces of silver, this would be too vague to support an action; for what pieces?—fifty cent pieces or dollars?—what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be, that they should be at least of a middling quality; but one hundred acres of land, without locality, without estimation of value, without relation to anything which could render it certain, does appear

to me to be the most vague of all promises; and, if any contract can be void for its uncertainty, this must be. One hundred acres on the Rocky Mountain, or in the Conestoga Manor—one hundred acres in the mountain of Hanover County, Virginia, or in the Conewango rich lands of Adams County—one hundred acres of George Sherman's mansion place at eighty dollars per acre, or one hundred acres of his barren lands at five dollars.

This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering in a *quantum meruit* for the value of this young woman's services until her marriage. If this promise had been that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any particular land; yet the party could recover back the money he had paid in an action. * * *. No evidence was given of the value of the land. The court stated the difficulty of giving damages for not conveying lands of the value of which nothing appeared. The plaintiff's counsel admitted the want of evidence of the value of the land was an incurable defect. If the defect of evidence of value would be incurable, the defect of all allegation or proof of anything by which the value could be regulated, anything to afford a clue to the jury by which to discover what was intended to be given, any measure of damages, would be fatal * * *.

I am therefore of the opinion that there was no error in the opinion of the lower court, by which the plaintiffs have been endamaged; that the law was laid down more favorably for them than the evidence warranted. Judgment affirmed.

FAIRPLAY SCHOOL TOWNSHIP *v.* O'NEAL,
127 Ind. 95 (1890).

A verbal contract was entered into March 31, 1888, by a teacher with the school trustee wherein the teacher undertook to teach the school for the term to be held in the school year 1888, for which the trustee promised to pay her "good wages." The question here involved was whether the promise to pay good wages was an enforceable promise.

ELLIOTT, *J.*: It is necessary for the information of the citizens that contracts made with teachers should be certain and definite in their terms, otherwise the citizens cannot guard their interests nor observe the conduct of their officer. It is necessary that the contract should be definite and certain in order that when the time comes for the teacher to enter upon duty there may be no misunderstanding as to what her rights are. Any other ruling would put in peril the school interests. Suppose for illustration that a contract providing for "good wages," "reasonable wages," "fair wages," or the like is made, and when the time comes for opening the schools there arises a dispute as to what the compensation shall be, how shall it be determined, and in what mode can the teacher be compelled to go on with the duty he has agreed to perform? Until there is a definite contract it can hardly be said that a teacher has been employed and the public interest demands that there should be a definite agreement before the time arrives for school to open, otherwise the school corporation may be at the mercy of the teacher, or else there be no school. We think that a teacher cannot recover from a school corporation for the breach of an executory agreement unless it is so full and definite as to be capable of specific enforcement.

**Offer or acceptance or both may be made by
words or conduct**

**FOGG v. PORTSMOUTH ATHENAEUM,
44 N. H. 115 (1862).**

Assumpsit.

The case was submitted to the decision of the court upon the following agreed statement of facts:

The defendants are a corporation whose object is the support of a library and public reading room, at which latter a large number of newspapers are taken. Some are subscribed and paid for by the defendants; others are placed there gratuitously by the publishers and others; and some are sent there apparently for advertising purposes merely, and of course gratuitously.

The Independent Democrat newspaper was furnished to the defendants, through the mail, by its then publishers, from Vol. 3, No. 1 (May 1, 1847). On the 29th of November, 1848, a bill for the paper, from Vol. 3, No. 1 (May 1, 1847), to Vol. 5, No. 1 (May 1, 1849), two years, at \$1.50 per year, was presented to the defendants by one T. H. Miller, agent for the then publishers, for payment. The defendants objected that they had never subscribed for the paper, and were not bound to pay for it. They at first refused on that ground to pay for it, but finally paid the bill to said Miller, and took upon the back thereof a receipt in the following words and figures:

"Nov. 29, 1848.

"The within bill paid this day, and the paper is henceforth to be discontinued.

"T. H. MILLER, for Hood & Co."

Hood and Co. were the publishers of the paper from May 1, 1847, until February 12, 1849, when that firm was dissolved, and the paper was afterwards published by the present plaintiffs. The change of publishers was announced, editorially and otherwise, in the paper of February 15, 1849,

and the names of the new publishers were conspicuously inserted in each subsequent number of the paper, but it did not appear that the change was actually known to Mr. Hatch, the secretary and treasurer of the corporation, who settled the above named bill, and who continued in the office till January, 1850.

The plaintiffs had no knowledge of the agreement of the agent of Hood and Co. to discontinue the paper, as set forth in the receipt of November 29, 1848, until notified thereof by the defendants, after they had furnished the paper to the defendants for a year or more; the books of Hood & Co., which came into their hands, only showing that the defendants had paid for the paper, in advance, to May 1, 1849.

After the payment of the bill and giving of the receipt above recited, the paper continued to be regularly forwarded by its publishers, through the mail, to the defendants, from the date of said receipt until May 1, 1849, the expiration of the period named in said bill; and was in like manner forwarded from May 1, 1849, to January 1, 1860, or from Vol. 5, No. 1, to Vol. 15, No. 35, inclusive, the period claimed to be recovered for in this suit; and was during all that time constantly taken from the post-office by the parties employed by the defendants to take charge of their reading room, build fires, etc., and placed in their reading room. Payment was several times demanded during the latter period, of the defendants, by an agent or agents of the plaintiffs; but the defendants refused to pay, on the ground that they were not subscribers for the paper.

Conspicuously printed in each number of the paper sent to and received by the defendants were the following:

"Terms of Publication: By mail, express or carrier, \$1.50 a year, in advance; \$2 if not paid within the year. No paper discontinued (except at the option of the publisher) unless all arrearages are paid." * * *

NESMITH, J.: There is no pretense upon the agreed statement of this case that the defendants can be charged

upon the ground that they were subscribers for the plaintiffs' newspaper, or that they were liable in consequence of the existence of any express contract whatever. But the question now is, have the defendants so conducted themselves as to make themselves liable to pay for the plaintiffs' newspaper for the six years prior to the date of the plaintiffs' writ, under an implied contract raised by the law and made applicable to this case.

If the seller does in any case what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself to the buyer, this is always a delivery. In like manner, as to the question of acceptance, we must inquire into the intention of the buyer, as evinced by his declarations and acts, the nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; or this intention may be manifested by a great variety of acts in accordance with the varying circumstances of each case. 2 Pars. on Con. 325.

Again the law will imply an assumpsit, and the owner of goods has been permitted to recover in this form of action, where they have been actually applied, appropriated, and converted by the defendant to his own beneficial use. *Hitchin v. Campbell*, 2. W. Black, 827. * * *

Where there has been such a specific appropriation of the property in question, the property passes, subject to the vendor's lien for the price. * * *

In *Weatherby v. Banham* (5 C. & P. 228) the plaintiff was publisher of a periodical called the *Racing Calendar*. It appeared that he had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook; Westbrook died in the year 1820; the defendant, Bonham, succeeded to Westbrook's property, and went to live in his house, and there kept an inn. The plaintiff, not knowing of Westbrook's death, continued to send the num-

bers of the Calendar as they were published, by the stage-coach, directed to Westbrook. The plaintiff proved by a servant that they were received by the defendant, and no evidence was given that the defendant had ever offered to return them. The action was brought to recover the price of the Calendar for the years 1825 and 1826. Talford, for the defendant, objected that there never was any contract between the plaintiff and the present defendant, and that the plaintiff did not know him. But, Lord Tenterden said: "If the defendant received the books and used them, I think the action is maintainable. Where books come addressed to the deceased gentleman whose estate has come to the defendant, and he keeps the books, I think, therefore, he is clearly liable in this form of action, being for goods sold and delivered."

The preceding case is very similar, in many respects, to the case before us. Agreeably to the defendants' settlement with Hood & Co., their contract to take their newspaper expired on the first of May, 1849. It does not appear that the fact that the paper was then to stop was communicated to the present plaintiffs, who had previously become the proprietors and publishers of the newspaper establishment; having the defendants' name entered on their books, and having for some weeks before that time forwarded numbers of their newspaper, by mail, to the defendants, they, after the first of May, continued so to do up to January 1, 1860. During this period of time the defendants were occasionally requested, by the plaintiffs' agent, to pay their bill. The answer was, by the defendants, we are not subscribers to your newspaper. But the evidence is, the defendants used, or kept the plaintiffs' books, or newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post-office.

If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given notice that they declined to take the paper longer.

We are of the opinion that the defendants have the right to avail themselves of the statute of limitations. Therefore, the plaintiffs can recover no more of their account than is embraced in the six years prior to the date of their writ, and at the sum of \$2 per year, with interest, from date of writ, or the date of the earliest demand of the plaintiffs' claim upon the defendants.

HOBBS *v.* MASSASOIT WHIP CO.,
158 Mass. 194 (1893).

HOLMES, J.: This is an action for the price of eel-skins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if the skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense of notifying the sender that he will not buy. The case was argued for the defendant on that inter-

pretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins, for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance * * * The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party,—a principle sometimes lost sight of in the cases.

* * * O'Donnell v. Clinton, 145 Mass. 461.

Exceptions overruled.

Seriousness of intent

KELLER v. HOLDERMAN,

11 Mich. 248 (1863).

Error to circuit court. Action by Holderman against Keller upon a check for \$300 drawn by Keller upon a banker at Niles and not honored. The cause was tried without a jury and the circuit judge found as facts that the check was given for an old silver watch worth about \$15 which Keller took and kept until the day of trial when he offered to return it to the plaintiff who refused to receive it. The whole transaction was a frolic and banter—the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn. The defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent his being liable upon it; but as he had failed to do so, and had retained the watch, the judge held him liable, and judgment was rendered against him for the amount of the check.

MARTIN, C. J.: When the court below found as a fact that "the whole transaction between the parties was a *frolic and a banter*, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment of the lower court reversed.

Promissory expressions

REIF v. PAIGE,
55 Wis. 496 (1882).

Appeal from the circuit court.

During the afternoon of December 3, 1880, the "Beck-with House," in Oshkosh, was destroyed by fire. The defendant and his wife lived in this hotel, occupying rooms in the fourth story. When the fire broke out Mrs. Paige was in those rooms and perished in the flames. The members of the fire department placed a ladder at a window near where Mrs. Paige was supposed to be, and at least two firemen attempted to enter the window and rescue her, but were driven back by the smoke and flames. The ladder was then removed, but subsequently was replaced at the same window. About this time, and after the fire had been raging 30 minutes or more, the defendant, who had been absent, reached the scene of the fire, and, as it is alleged in the complaint, offered and promised to pay a reward of \$5000 to any person who would rescue his wife from the burning building dead or alive. The plaintiff claims that he has earned the reward thus offered, and has brought this action to recover the same.

The complaint alleges that the plaintiff on being informed of such offer and promise, and confiding in and relying upon the same, entered such rooms in the fourth story of the burning building, at great peril to his life and health, removed therefrom the dead body of Mrs. Paige and delivered the same to the defendant. Also that no part of the said \$5000 has been paid to him, and that the same is now due and payable. * * *

The testimony on the trial tended to prove that the defendant offered the reward and that with knowledge of the offer and on the faith of it, and for the purpose of earning the reward, the plaintiff ascended the ladder, entered the building and rescued the dead body of Mrs. Paige from the

flames to the knowledge of the defendant. No formal notice was given by the plaintiff to the defendant before this action was commenced that the former had acted in the premises upon such offer and claimed the reward, and no demand therefor was made upon the defendant. The circuit court non-suited the plaintiff, and judgment against him was entered accordingly. The plaintiff appealed.

LYON, J.: * * * The offer of a reward by the defendant for rescuing the body of his wife, and the rescue of her remains by the plaintiff with knowledge of such offer, and with a view to obtaining the reward offered, constituted a contract between parties, which was fully and completely executed by the plaintiff. The offer which the proofs tend to show the defendant made, was, in substance, "I will give \$5000 to any person who will bring the body of my wife out of that building, dead or alive." There was no restrictions or limitations to the offer, and no additional requirement upon the claimant of the offered bounty. Hence when the plaintiff, with a view to obtaining the offered reward, rescued the body of Mrs. Paige, he had done all that the offer required him to do, and if he has any cause of action it was then complete. * * *

The learned circuit judge non-suited the plaintiff on the ground that it was his duty as a paid officer and member of the fire department of Oshkosh to rescue persons as well as property from fires, and that it was against sound public policy to allow him to contract for a reward for recovering the body of Mrs. Paige. * * *

There was considerable discussion by counsel as to what are the duties of firemen. We know of no guide for ascertaining these duties other than the charter of the municipality, in which they are employed, and the ordinances or by-laws enacted pursuant thereto. The ordinances of the city of Oshkosh in respect to its fire department were read in evidence, and reference made to the city charter in that behalf. We do not care to comment upon

these for we are clear that there is nothing in them which made it the duty of the plaintiff to enter the fourth story of the burning building and rescue the body of Mrs. Paige from the flames, at the imminent hazard of losing his own life. That he incurred such hazard there can be no doubt from the testimony. He did not, as does a soldier, contract to risk his life in the service. The most that can reasonably be claimed is that, short of risking his life, he contracted to use his best judgment and efforts in extinguishing fires, and in saving persons and property from destruction or injury. But it is quite doubtful whether a fireman employed under the charter and ordinances of Oshkosh owes any duty *as a fireman* to rescue persons from burning buildings.

* * *

It follows, that inasmuch as the plaintiff could not rescue the body of Mrs. Paige from the burning building without imminent peril of losing his own life, and inasmuch as it was not his duty as a paid officer and member of the fire department to do so, he is in a position to claim the reward alleged to have been offered by the defendant for such rescue.

Judgment of non-suit must be reversed and the cause will be remanded for a new trial.

Quotation of price

KNIGHT *v.* COOLEY,

34 Iowa 218 (1872).

This was an action brought to recover damages for breach of alleged contract for the sale and conveyance of certain real estate. The contract, as claimed by plaintiff was made by correspondence between the parties. The negotiation was commenced by the plaintiff writing to the

defendant in May, 1866. As to the precise terms of this letter, which did not appear in evidence, the parties did not agree. The defendant in his evidence made the following statement of its contents: "The letter of Knight asked me two questions: If I was the owner of the south two-fifths of lot 469, and if so, what was the price of the same? That is all there was in it." The plaintiff testified in regard to this letter as follows: "I can't give the exact words I used; could not pretend to do that. My recollection is, that in my letter to Cooley I asked him whether he was the owner of the south two-fifths of lot 469, in city of Dubuque, and asked him what he would sell them for, and I think I said to him name his lowest cash price, and I would let him know at once whether I would accept or not."

To this letter defendant replied as follows:

WASHINGTON, May 18, 1866.

FRIEND KNIGHT:

"Yours is received. The lots are so encumbered it would be difficult to make title at once. Price, \$1700, and \$1500 net and cheap.

"Truly,

"D. N. COOLEY."

Plaintiff's reply is in this language:

"DUBUQUE, May 22, 1866.

"HON. D. C. COOLEY,

"Washington.

"Dear Sir:—Yours of the 18th instant is at hand. I will take the lots proposed by you in it, and herewith send you draft for \$100 on account of the bargain. The balance of the money is ready, and will be paid you immediately on good, clear title being made. I wish you would proceed to have the title made at your earliest convenience.

"Yours,

"W. J. KNIGHT."

This draft sent in this letter was returned or offered to be returned, to the plaintiff within a short time after its receipt.

The court instructed the jury that the correspondence constituted a contract.

Verdict and judgment for plaintiff.

BECK, CH. J.: The instruction given by the court to the jury to the effect that the correspondence * * * constituted a contract, is erroneous. Defendant's evidence is to the effect that the letter simply inquired if he was the owner of the property, and the price thereof. It made no proposition to purchase, named no purchaser, and, in fact, contained nothing which could have been so understood. The answer to this letter simply states a price which the defendant regards as "cheap," and the fact that it would be difficult to make a title at once. We do not understand the letter to contain a proposition to sell the lots. The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may desire to choose the purchaser and may not be willing to part with his property to anyone who offers his price. We regard the correspondence, taking it as given in defendant's testimony, so far as it goes, as amounting, on defendant's part, simply to a negotiation, and not to a binding offer. It required the acceptance by him of the offer contained in plaintiff's last letter to create a binding contract.

Judgment of lower court reversed.

Editor's Note.—General advertisements in newspapers, by department stores are mere quotations of prices. Expressions laudatory of the commodity presented to the public, or to a person, are not to be taken as constituting any part of an offer and do not bind the one using such expressions. (*Carlill v. Carbolic Smoke Ball Co.*, 1 Q. B. 256.)

Competitive bids as offers

LESKIE *v.* HAZLETINE,

155 Pa. 98 (1893).

This was an action on an alleged agreement to award a building contract. At the trial it appeared that by a letter dated March 28, 1887, the defendant requested the

plaintiff to bid for the contract of erecting the Hazletine Building in Philadelphia. Plaintiff complied with the request and presented a bid which was found to be the lowest bid. Plaintiff testified that when the bids were opened defendant said to him: "You are the lucky man * * * You have won, and fairly so." Plaintiff further testified in effect that he was to begin work as soon as the contract was signed. The court charged the jury in part as follows: * * * "It is incumbent upon the plaintiff, before he is entitled to a verdict in this case, to satisfy you by the evidence that there was a distinct promise made to him, a distinct agreement made with him; not merely that there was talk about his being the successful bidder and his probably getting the contract, but he must show that at some time the defendant, or somebody authorized to speak for the defendant, entered into that agreement with him, not that he talked about it.

"It is a very serious question in my mind whether there is evidence in this case which would justify you in reaching the conclusion that there was at any time any such agreement entered into, that the minds of the defendant and plaintiff ever met upon a distinct agreement that the plaintiff should have this contract, and I say to you at this point * * * that the mere fact that the plaintiff was the lowest bidder gave him no right whatever to get the contract. It was not necessary to put in the invitation for bids or the specifications that the owner of the ground reserved the right to reject the lowest bidder or any other." * * *

Verdict and judgment for defendant. Plaintiff appealed.

PER CURIAM: The plaintiff was admittedly the lowest bidder for the erection of the defendant's building. It does not follow, however, that because he was the lowest bidder the defendant was bound to award him the contract. The fact that, upon the opening of the bids, either the architect or the defendant may have said to the plaintiff:

"You are the lucky man," amounts to nothing more than the recognition of the fact that he was the lowest bidder. After the bids had been opened, it was the right of the defendant to inquire into the fitness and ability of the respective bidders to fulfill the contract. He was not bound to award it to a bidder who lacked either the skill, experience, or ability to properly perform the contract. In this case the contract never was awarded to the plaintiff. There were a number of questions to be settled, when the defendant and the bidder were brought together, before their minds could be said to have agreed upon anything.

The learned judge below submitted the case to the jury under proper instructions, and their verdict is the end, of the matter.

Judgment affirmed.

Offer must be communicated

FITCH v. SNEDAKER,

38 N. Y. 248 (1868).

WOODRUFF, J.: On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of two hundred dollars * * * "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female.

On the 15th day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail, and though not in terms so stated, the case warrants the inference, that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove, that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury and to the court on the trial after Fee was in jail, and that, without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The court thereupon directed a non-suit.

It is entirely clear, that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed; both are conditions precedent. No one could therefore claim the reward who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and, however clear, that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in *Jones v. The Phoenix Bank*, 8 N. Y. 228; *Thatcher v. England*, 3 Com. Bench, 254.

In the last case it was distinctly held, that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property and producing pawn-brokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together

witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery."

In the present case, the plaintiff after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to, therefore, establish that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction, and, therefore, evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by the plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the plaintiffs before they heard of this reward, necessarily answers this question in the negative.
* * *

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is assumpsit. The defendant is proceeded against as upon his contract to pay, and the first question is was there a contract between the parties?

To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer.

The *motive* inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the 15th day of October, 1859, the murderer, Fee, had in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was *prospective* to those who will, in the future, give information, etc.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. Chitty on Con. (5th Am. ed.), Perkins' notes, p. 10, 9, and 2, and cases cited. Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded and the non-suit necessarily followed.

The judgment should be affirmed.

Judgment affirmed.

Acceptance must be communicated

ROYAL INS. CO. *v.* BEATTY,
119 Pa. 6 (1888).

Assumpsit to recover upon two policies of insurance.

At the close of the testimony, the defendant requested the court to charge the jury: That there was no evidence of an acceptance, by the defendant of the offer of the plaintiff to renew the policies, and the verdict of the jury must be for the defendant. The court refused to affirm this point, and submitted the cause upon the evidence.

Verdict for plaintiff.

GREEN, J.: We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not formally been renewed.

At the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring tomorrow. The Court: Who were the policies for? A. Mr. Beatty. The Court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court: What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it pos-

sible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard or that it was not intended to comply with the request. Especially is this the case, when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the Court and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly, to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can stand. But what was the position of the plaintiff? He had

asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further actual attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request, and not answering it is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

**What amounts to communication of acceptance—
Constructive acceptance**

TAYLOE v. MERCHANTS' FIRE INS. CO.,
9 Howard (U. S.) 390 (1850).

NELSON, J.: This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling house to the amount of \$8,000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of \$56. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be de-

posited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling house in the meantime, on the 22nd of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one, is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,
2. The non-payment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that

the assent of the company, expressed or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete, until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of the opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail, to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And, besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract become complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the

minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to consummate the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded;" obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of *Adams v. Lindsell* (V. Barn. & Ald. 681) and *Mactier's Adm'rs. v. Frith* (6 Wend. 104) are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of *Eliason v. Henshaw* (4 Wheat. 228) in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

II. The next position against the claim is the non-payment of the premium. * * *

Decree reversed.

Editor's Note.—"The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. The assent must either be communicated to the other party or some act must have been done which the other party has expressly or impliedly offered to treat as a communication. Where parties are

distant from each other and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance, is not of itself sufficient to complete the contract. In such a case the act must involve an irrevocable element and the letter must be placed in the mail or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender before the assent becomes effectual to consummate a contract, and not then unless the offer is still standing.—*Troutslime & Co. v. Sellers*, 35 Kan. 447.

A United States mail box at a street corner, or a mail chute is a postoffice within the meaning of the above cases.—*Wood v. Callaghan*, 61 Mich. 402.

Acceptance must not vary from terms of offer

JENNESS v. MT. HOPE IRON CO.,
53 Maine 20 (1864).

Assumpsit for alleged breach of contract.

WALTON, J.: The negotiation was carried on by letters as follows:

Plaintiff—October 20, 1862, "What will you sell me kegs of nails for, delivered at Bangor, in the course of a month, cash down?"

Defendants—October 23, 1862, "We will sell you 450 casks common assorted nails, delivered on the dock at Bangor at \$3.62 per keg of 100 lbs. each, cash."

Plaintiff—October 27, 1862, "Nails have advanced so much I am almost afraid to buy, but you will send me as soon as possible, 303 kegs (naming the kinds), and I will send you a check on Exchange Bank of Boston."

Plaintiff—November 11, 1862, "Not having heard whether you have shipped the nails ordered, I thought I would write you as we shall have but a few weeks more of navigation."

Defendants—November 14, 1862, "It will not be possible for us to get out the nails you have ordered this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it."

This is the whole substance of the written correspondence between these parties, and we look in vain to find in it

evidence of a contract *completed*; a proposition by one party, accepted without modification by the other. The defendants offered to deliver 450 casks at \$3.62 per cask; but this offer was not accepted by the plaintiff; and his order for 303 casks does not appear to have been accepted by the defendants. We look in vain for a distinct proposition by either party, which is accepted without modification by the other. To constitute a contract, there must be a proposition by one party, accepted by the other without any modification whatever. If the acceptance modifies the proposition in any particular, however trifling, it amounts to no more than a counter proposition. It is not in law an acceptance which will complete the contract. The letters between these parties failed therefore to establish a *prima facie* case for the plaintiff.

Plaintiff non-suit.

Acceptance by act

DAY *v.* CATON,
119 Mass. 513 (1875).

Contract to recover value of one-half of brick party wall built by the plaintiff upon and between the adjoining estates 27 and 29 Greenwich Park, Boston. * * * The plaintiff had an equitable interest in lot 29. The plaintiff testified that there was an express agreement on the defendant's part to pay him one-half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point. The judge instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff with the defendant's knowledge built the wall, and the defendant used it, but it

might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff." The jury found for the plaintiff. The defendant excepted.

DEVENS, J.: The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff with the defendant's knowledge, built the wall, and that the defendant used it, is conceded to have been correct. * * * The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. *Taft v. Dickinson*, 6 Allen 553. It must be shown that, in some manner, the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable and his exercise of the option to avail himself of them, justified this inference. *Abbott v. Hermon*, 7 Greenl. 118, and when one stands by in silence and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it. The maxim, *Qui tacet consentire videtur*, is to be construed indeed as applying only to those cases where

the circumstances are such that a party is fairly called upon either to deny or admit his liability. But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb v. Bunce*, 4 M. & S. 275. If a person saw day after day a laborer at work in his field doing services, which must of necessity enure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work, and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge. Exceptions overruled.

Right to revoke an offer before acceptance

FISHER v. SELTZER,

23 Pa. 308 (1854).

Action by Fisher, late sheriff, to recover from Seltzer the difference between the amount bid at a sale of property and the amount realized at a second sale, with costs, etc. The sheriff, before the sale, had prescribed certain

rules or conditions, among which were that "no person shall retract his or her bid," and that if a bidder failed to comply with all conditions of the sale, "he shall pay all costs and charges." At the sale Seltzer bid seven thousand dollars, under the belief that the property was to be sold free of a certain mortgage for six thousand dollars. Discovering his error, he retracted his bid before it was accepted, but the sheriff, denying this right of retraction, knocked down the property to him. He refused to take it. On a resale it brought only one thousand five hundred dollars. Judgment was entered for plaintiff for the costs of the second sale only. Plaintiff prosecuted a writ of error.

LEWIS, J.: Mutuality is so essential to the validity of contracts not under seal, that they cannot exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance. In such a case there is no contract, and the bid may be withdrawn without liability or injury to any one. The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriff's sales, where the rule of *caveat emptor* operates with all its vigor. It is necessary, in order that bidders may not be entrapped into liabilities never intended. Without it, prudent persons would be discouraged from attending these sales. It is the policy of the law to promote competition, and thus to produce the highest and best price which can be obtained. The interests of debtors and creditors are thus promoted. By the opposite course, a creditor might occasionally gain an advantage, but an innocent man would suffer unjustly, and the general result would be disastrous. A bidder at sheriff's sale has a right to withdraw his bid at any time before the property is struck down to him, and the sheriff has no authority to prescribe conditions which deprive him of that right. Where the bid is thus withdrawn before acceptance, there is no contract, and such a

bidder cannot, in any sense, be regarded as a "purchaser." He is, therefore, not liable for "the costs and charges" of a second sale. Where there has been no sale, there can be no resale.

The judgment ought not to have been in favor of the plaintiff, even for "the costs and charges" of the second sale; but as the defendant does not complain, we do not disturb it.

Judgment affirmed.

Effect of option on revocation of offer

COLEMAN *v.* APPLGARTH,
68 Md. 21 (1887).

Alvey, C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon which the application is made, and which is sought to be specifically enforced, reads thus:

"For and in consideration of the sum of five dollars, paid me, I do hereby give to Charles Coleman the option of purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed dated, etc., subject to the ground rent therein mentioned, at and for the sum of \$645 cash, at any time on or before the first day of November, 1886."

It was dated the 3d of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of the 3d of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exer-

cise of such option to the 1st of December, 1886. It is further alleged that, about the 9th of November, 1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of \$700; and that subsequently, but prior to the 1st of December, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of \$645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is, that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff upon payment by the latter of the \$645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract, or optional right existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed.

The plaintiff was examined as a witness in his own behalf and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract exhibited, as upon demurrer; such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time,

and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. * * * Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this Court, made in respect to an optional contract to purchase, in the case of *Maughlin v. Perry*, 35 Md. 352.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the 3d of September, 1886. But it is alleged and shown that before the expiration of such time, the defendant Applegarth, verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the 1st of November to the 1st of December, 1886; and that it was within this latter or extended period and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was

a mere *nudum pactum*, and therefore not enforceable, to say nothing of the statute of frauds, which has been invoked by the defendants. After the 1st of November, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff.

The principles that govern in cases like the present are very fully and clearly stated by the English court of appeal in chancery in the case of *Dickinson v. Dodds*, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words: "This offer to be left over until Friday, nine o'clock, A. M.," two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the court of appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, Lord Justice James said:

"There was no consideration given for the undertaking or promise to whatever extent it may be considered binding, to keep the property unsold until nine o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until nine o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear, settled law, on one of the clearest principles of law, that this promise being a mere

nudum pactum, was not binding, and that at any moment before complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle or authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

And Lord Justice Mellish was quite as explicit in stating his judgment, in the course of which he said:

"He was not in point of law bound to hold the offer over until nine o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it and Allan does not admit that he knew it, but I will assume that he did) that Dodds made the offer to Dickinson, and had given him until Friday morning at nine o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds."

And further on he says:

"If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to someone else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when one of the persons to whom the offer was made knows that the property has been sold to someone else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was, therefore, too

late for him to attempt to accept the offer, and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the court below, dismissing the bill of the plaintiff, must be affirmed.

Decree affirmed.

Editor's Note.—The plaintiffs, the owners of a distillery, and defendant signed a paper in which the plaintiffs agreed that the defendant might purchase the distillery during the year 1871 for \$5000, defendant agreeing that he would pay plaintiffs \$1000 if he did not buy during the year for the privilege. The court said: "It is not a bargain and sale of the property at \$5000, but a proposition and obligation on the part of the plaintiffs, to sell it to the defendant at that price, with the privilege to him to make the purchase or not, as he may determine within the year. For this option which was a valuable privilege, he agrees to pay the \$1000 in the event of his declining to make the purchase. The defendant acquired the right under the contract to purchase the property for the proposed price. The plaintiffs had obligated themselves to sell at that price; but defendant was under no obligation to buy. He merely bound himself to pay the \$1000 for the privilege of buying, and in case he did not buy, it was entirely optional with the defendants to purchase the property or let it alone; whilst the plaintiffs had abandoned the right to make sale to anyone else during the year."—*Grebenhorst v. Nicodemus*, 42 Md. 236.

Necessity for communication of revocation of offer

BRAUER *v.* SHAW,
168 Mass. 198 (1897).

Two actions of contract for the alleged breach of two contracts. The lower Court ruled that the plaintiffs were not entitled to recover in either action and directed the jury to return a verdict for the defendants in each case. The plaintiffs excepted.

HOLMES, J.: The two actions are based on alleged contracts letting all the cattle carrying space on the Warren Line of Steamship for the May sailing from Boston to Liv-

erpool, the first contract at the rate of 50 s. per head; the second, an alternative one at 52 s. 6d. per head.

[The Court was of the opinion that for one reason or another the right to compensation upon the first contract was not made out.]

We come then to the later telegrams of the same day which are relied upon as making the second contract. At half past eleven the defendant telegraphed, "Subject prompt reply, will let you May space, fifty-two six." This was received in New York at sixteen minutes past twelve, and at twenty-eight minutes past twelve a reply was sent accepting the offer. For some reason this was not received by defendants until twenty minutes past one. At one the defendants telegraphed revoking the offer, the message being received in New York at forty-three minutes past one. The plaintiff held the defendants to their bargain, and both parties stand upon their rights.

There is no doubt that the reply was handed to the telegraph company promptly, and at least, it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If, then, the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even the revocation of the offer had not been received. It seems to us a reasonable requirement, that to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act, they brought about a relation between themselves and the plaintiffs, which the plaintiffs could turn into a contract by an act on their part, and authorize the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose, that you offer, and to offer, are the same thing. *O'Donnell v. Clinton*, 145 Mass. 461. The of-

fer must be made before the acceptance, and it does not matter whether it is made a longer or a shorter time before, if, by its express or implied terms, it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of acceptance, and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract; for instance, a sale by an agent elsewhere one minute after the principal personally has offered goods which are accepted within five minutes by the person to whom he is speaking. The principle is the same when the time is longer, and the act relied on a step looking to, but not yet giving notice.

Exceptions sustained.

Editor's Note.—The offer may be withdrawn and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party, but if before that time the offer is accepted, the party making the offer is bound and the withdrawal thereafter is too late. In this case it appears the defendant's letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted and it has been argued that the onus is on the plaintiff to show that the sending of the acceptance preceded the sending of the letter of withdrawal. This position is not clear; it is quite immaterial to inquire whether the defendant's letter or the plaintiff's draft was first sent.

Until the notice of the withdrawal of the offer actually reached the plaintiff the offer was continuing and the acceptance thereof completed the contract.—*Wheat et al. v. Cross*, 31 Md. 99.

Offer must be accepted within *reasonable time*

AVERILL ET AL. *v.* HEDGES,

12 Conn. 424 (1838).

Motion for new trial.

This as an action of assumpsit. On February 29, 1836, Averill residing at Hartford, Conn., inquired by letter of John Thomas, agent for Washington Iron Co., at Wareham, Mass., upon what terms he could supply Averill with a quantity of iron of certain descriptions. On March 2, Thomas replied specifying the terms on which he would furnish the articles in question. On the 14th of March Averill wrote to Thomas on other business, but took no notice of the offer made in Thomas' first letter. On the 16th Thomas replied and at the close of his letter inquired of Averill whether he accepted his proposal regarding the iron. This letter arrived at Hartford on the 18th of March about two o'clock P. M. In a letter dated the 19th, but not put into the post office until the 20th Averill accepted Thomas' proposal. There was no direct mail to Wareham going out on the 20th, which was Sunday. The letter was not actually sent until the morning of the 21st, and it reached Thomas with another letter from Averill dated the 21st on the 23rd. Previous to this Thomas had disposed of the iron and could not comply with Averill's order. On the 19th there was a direct mail to Wareham leaving Hartford between five and six o'clock A. M., by which a letter would reach Wareham next day.

BISSEL, J.: The great question in the case, is, whether upon the facts, there has been an acceptance of the defendant's offer, so that he is bound by it. * * *

It is very immaterial when the letter of acceptance of the plaintiff was written; until sent it was entirely in their power and under their control; and was no more an acceptance of the defendant's offer, than a bare determination, locked up in their own bosoms, and uncommunicated, would have been. And it surely will not be claimed that

mere volitions, a mere determination to accept a proposal, constituted a contract. The plaintiffs, then did not accept the defendant's proposition, until the 20th, and for aught that appears, until the evening of that day. That they were bound to accept, within a reasonable time, was distinctly admitted in the argument; and if not admitted the position is undeniable. The case of the plaintiffs, then, comes to this, and this is the precise ground of their claim; that they had a right to hold the defendant's offer under advisement for more than 48 hours, and to await the arrival of three mails from New York, advising them of the state of the commodity in the market; and having then determined to accept, the defendant was bound by his offer; and that this constitutes a valid mercantile contract. Now in regard to such a claim, we can only say, that it appears to us to be in the highest degree unreasonable; and that we know of no principle, of no authority, from which it deserves the slightest support.

Indeed it seems to us to be subversive of the whole law of contracts. However, it is most obvious, that if, during the interval, the defendant was bound by his offer, there was entire want of mutuality; the one party was bound, while the other was not. Had a proposition been made at a personal interview between the parties there can be no pretense, that it would have bound the defendant beyond the termination of the interview. * * * Thus in the case of *Adams v. Lindsell*, 1 B. & A. 681, there was an offer to sell goods on certain specified terms, provided an acceptance of the offer was signified by return mail. This was done; and it was held, (the defendant not having retracted his offer in the meantime), that the contract was complete. It is not easy to reconcile this decision with that of *Cookes v. Oxley* (3 T. Rep. 653) unless it can be distinguished on the ground, that as the offer was made through the mail, the party is to be considered as repeating the offer at every moment until the other party has had an opportunity of

manifesting his acceptance. And this seems to have been the ground on which the case was placed by the court of King's Bench. They say: "If the defendants were not bound, by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendant had received their answer and was bound by it; and so it might go on *ad infinitum*. The defendants must be considered in law, as making, during every instant of time a letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed, by the acceptance of it by the latter."

The case of *Adams v. Lindsell* is regarded as an authority, and followed by the Supreme Court of Errors of the State of New York in *Mactier v. Frith*, 6 Wend. 103. And there the doctrine is asserted, that the acceptance of an offer, made through the medium of a letter, binds the bargain, if the party making the offer has not in the meantime, revoked it. In this case which goes as far as any of the cases on this subject, the rule is laid down that the offer continues until the letter containing it is received, and the party has had fair opportunity to answer it. And it is further said, that a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An offer, then, made through a letter, is not continued beyond the time that the party has a "fair opportunity" to answer it. Once establish the principle that a party to whom an offer is made, may hold it under consideration, more than 48 hours, watching in the meantime the fluctuations of the market, and then bind the other party by his acceptance, and it is plain that you create a shock through the commercial community, utterly destructive of all mercantile confidence. No offers would be made by letter. It would be unsafe to make them.

New trial not granted.

Editor's Note.—When a letter containing an offer requires an answer by return mail, the acceptance must be sent by the next post.

If the offer does not specify the time, the acceptance must be within a reasonable time, or the offer will lapse.

When the parties are dealing with regard to a mercantile commodity the price of which in the market changes from day to day, and the party who receives the offer does not post his acceptance during the same business day, he cannot take advantage of a rise in the market price, and accept upon some other business day. What in any case is reasonable time must be dependent upon the situation of the parties, and the subject matter of the negotiations.

What is a reasonable time for acceptance is a question of law for the court in such commercial transactions as happen in the same way, day after day, and present the question upon the same data in continually regarding instances, and where the time taken is so clearly reasonable or unreasonable that there can be no question of doubt as to the proper answer to the question. When the answer to the question is one dependent on many different circumstances, which do not continually recur in other cases of like character, and with respect to which no certain rule of law could be laid down, the question is one of fact for the jury.—*Boyd v. Peanut Co.*, 25 Pa. S. C. 199.

Lapse—Failure to accept in manner prescribed

ELIASON ET AL. *v.* HENSHAW,

4 Wheaton (U. S.) 225 (1819).

Error to the Circuit Court for the District of Columbia.

WASHINGTON, J.: This is an action, brought by the defendant in error, to recover damages for the non-performance of the agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour, at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect.

A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Capt. Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it, when the markets will answer to advantage, or we will purchase at market price, when delivered; if you are disposed to engage two or three hundred barrels

at present, we will give you \$9.50 per barrel, deliverable the first water, in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add, "Please write by return of wagon, whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant, at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant, on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs, at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at \$9.50 per barrel, I accept; shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour; more particularly, as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted." The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not, in fact, return in the defendant's employ. The flour was sent down to

Georgetown some time in March, and the delivery of it to the plaintiffs was regularly, tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The Court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon in traveling from Harper's Ferry to Mill Creek and back again with a load of flour, about what time they should receive the desired answer, and therefore it was entirely

unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstances of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the Court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed, and cause remanded, with directions to award a venire facias de novo.

Editor's Note.—Where an offer is sent by mail, a reply accepting the offer sent by telegram or other means equally expeditious with the mails if received by the offeror would effect a contract. Where the offer is by advertisement an acceptance by post is not communicated until the letter of acceptance actually reaches the offeror. *Haldane v. U. S.*, 69 Fed. 819.

Lapse—Passage of time**LONGWORTH ET AL. EXECUTORS, v. MITCHELL,
26 Ohio 334 (1875).**

Nicholas Longworth leased a certain lot in the city of Cincinnati to the defendant for a term of fourteen years. The lease also contained a provision that Mitchell might purchase at any time during the first seven years of occupancy at the rate of \$250, per front foot, or at any time within the last seven years at the rate of \$300 per front foot. Just before the close of the first period, Mitchell elected to become the purchaser of the lot, and tendered to the executors of Longworth \$250 per front foot, and demanded a deed. The executors refused to make deed on the ground, among others, that prior to the time when Mitchell tendered the sum stipulated they, the executors, were negotiating for the sale of the lot to the C. & I. R. R. Co. They alleged that Mitchell was aware of this negotiation and had agreed with the executors that he would surrender his lease to them if they would pay him \$2,000 and gave them two weeks in which to accept and comply with the offer. There was a conflict of evidence at the trial as to whether an offer was made by the executors within the two weeks' period allowed. The Court found that the offer was made sixteen days before it was accepted by the executors, and thereupon rendered judgment in favor of Mitchell, ordering a specific execution of the contract.

Among other errors which were assigned as reasons for the reversal of judgment was the following: "The time allowed for acceptance of the offer was not material, and its acceptance two days after the expiration of the two weeks was sufficient."

WELCH, C. J.: The rule frequently adopted in a court of equity, that time is not of the essence of a contract, does not apply as we understand the law, to a mere offer to make a contract. The offer rests upon no consideration, and may

be withdrawn at any time before acceptance. An offer without time given for its acceptance must be accepted immediately, or not at all; and a limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. A standing offer is in the nature of a favor granted to the opposite party, and cannot on any just principle be made available after the time limit has expired.

Judgment affirmed.

Lapse—Death of the promisor

PRATT ADMX. v. BAPTIST SOCIETY,

93 Ill. 475 (1879).

Action on notes. Plaintiff had judgment below.

The Baptist Society obtained judgment against Mary L. Pratt as administratrix of the estate of P. B. Pratt, on two promissory notes executed by the deceased, one for \$300 and the other for \$327.50. These notes were given to enable the Baptist Society to purchase a bell. It was shown at the trial that a bell was procured and probably upon the faith of the notes, but it appears with reasonable certainty that this had been done since Pratt's death. The question raised on appeal was whether Pratt's death revoked the promise expressed in the notes, no money having been expended or labor bestowed, or liability of any kind incurred prior to his death, upon the faith of that promise.

SCHOLFIELD, J.: The promise stands as a mere offer and may by necessary consequence, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. *McClure v. Wilson*, 43 Ill. 356, and

cases there cited. Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires someone capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

Judgment reversed.

Offer is made irrevocable by acceptance

COOPER v. LANSING WHEEL COMPANY,
94 Mich. 272 (1892).

Assumpsit: Defendant demurred to the declaration and the demurrer was sustained. Plaintiffs bring error. The facts appear in the opinion.

MONTGOMERY, J.: This is an appeal from a judgment sustaining a demurrer to plaintiff's declaration. The first count of the declaration alleges an agreement "whereby the said defendant did undertake, promise, and agree, to and with the plaintiff to furnish, sell and deliver to said plaintiffs all such number or quantity of wheels, at and for an agreed price, as said plaintiffs should or might require or want, during the season of the year 1890, in their said business of manufacture." That during the season of 1890 plaintiffs agreed to order, and did order, of defendant all of such wheels as they might or should want or require in their said business; that certain orders so given were filled, and that certain other orders given in November and De-

cember, 1890, defendant refused to fill. The second count sets forth a written agreement, which is as follows:

"OWOSSO, MICHIGAN, December 16, 1889.

"MRSRS. LANSING WHEEL Co.,
Lansing, Mich.

"Gentlemen:

"Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, \$6.00; C, \$5.00; D, \$4.00 per set f. o. b., Owosso, thirty days. All the wheels to be good stock and smooth. Should we want a few D wheels to be extra nice stock, all selected white, they are to be furnished at the same price, not to exceed 10 set in a hundred.

"Very respectfully yours,

"(Signed) OWOSSO CART COMPANY."

Upon receipt of this instrument defendant endorsed thereon the following: "Accepted Lansing Wheel Company." Then follow the allegations as to giving and filling of certain orders, and the refusal to fill certain other orders which were given.

The defendant demurred to this declaration, the substantial ground of demurrer being that there was no mutuality of contract between the parties.

It was early held in England that a proposition to sell goods at a certain specific price, and to give the offeree a stated time in which to accept or reject the offer, did not make a binding contract which could not be withdrawn before acceptance. *Cooke v. Oxley*, 3 T. R. 653. * * * It is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. It was, therefore, within the power of defendant, in the present case, to withdraw the offer made at any time before the plaintiffs had acted upon it. Authorities may be found which go further than this. The case of *Bailey v. Austrian* (19 Minn. 535), holds that a contract by which defendant agreed to supply plaintiff with all the pig iron wanted by them in

their business until December 31st next ensuing, at specified prices, and the plaintiff simultaneously promised to purchase of defendant all of the iron which they might want in their said business during the time mentioned, at said prices, is not a mutual contract which can be enforced, on the ground that the plaintiffs did not engage to want any quantity whatever.

In *Keller v. Ybarru* (3 Cal. 147), plaintiff counted upon an agreement by defendant, whereby he undertook to sell and deliver to the plaintiff so many of the grapes then growing in his vineyard as the plaintiff should wish to take, for which the plaintiff agreed to pay the defendant ten cents per pound on delivery. The plaintiff averred that he subsequently notified the defendant that he wished to take 1900 pounds of grapes, and tendered \$190 in payment therefor, and requested the defendant to deliver such grapes to the plaintiff, but defendant refused to deliver the same, or any part thereof. The Court held that this agreement, when first entered into, amounted to an offer upon the part of the defendant, which the plaintiff had a right to accept or reject, and the defendant to retract at any time before acceptance, but that when the plaintiff named the quantity of grapes which he desired to take under the offer of defendant, the contract was complete, and both parties were bound by it.

In *Railroad v. Bartlett*, 3 Cush. 224, it was held that a proposition in writing to sell land at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but, if not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract.

So it is generally held that in suits upon unilateral contracts, if the defendant has had the benefit of the consideration for which he bargained, he can be bound. *Jones v. Robinson*, 17 Law J. Exch. 36.

If it be held, as we think the correct doctrine is, that an offer to furnish such goods as the plaintiff may want within a stated time, may, upon acceptance by the offeree before withdrawal, constitute a valid contract, it is difficult to see why, if the offeree orders any portion of the goods and the offeror has the benefit of the sale, the entire contract may not become valid and binding. This certainly would constitute a sufficient consideration. If, in the present case, the defendant had in consideration of the present sale and delivery to the plaintiff of one lot of wheels at a stated price, and for which the defendant received its pay, further agreed to furnish such further quantity of wheels as the plaintiffs might desire during the season, it would seem that a purchase of the one lot, as offered, would afford a sufficient consideration for defendant's undertaking. This view is adopted in England.

Judgment should be reversed with costs and defendant given leave to plead over.

Chapter II
SEAL AND CONSIDERATION

"SEAL"

LORAH *v.* NISSLEY,
156 Pa. 329 (1893).

Rule to open judgment entered on a note alleged to be under seal. The note was in the following form:

"MOUNT JOY, PA., August 22, 1881.

"\$200.00.

"Five months after date I promise to pay to Jacob E. Lorah, or order, at the First National Bank of Mount Joy, Two Hundred Dollars and without defalcation or stay of execution, value received. And I do hereby confess judgment for the said sum, costs of suit, and release of all errors, waiving inquisition and confess condemnation of real estate. And I do further waive all exemption laws, and agree that the same may be levied by attachment upon wages for labor or otherwise.

"Witness:

"HENRY B. NISSLEY, Seal

"GEORGE SHIERS.

"Seal."

The word "seal" following the signature of the maker was printed. The Court held that the note was not under seal, and permitted the defendant to plead the statute of limitations.

MITCHELL, C. J.: The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, *Alexander v. Jameson*, 5 Bin. 238, and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely and even of wafers very largely ceased. In short, sealing has become constructive rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in *McDill's Lessee v. McDill*, 1 Dal. 63, that "the signing of a deed is now the

material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good;" and in *Long v. Ramsay*, 1 S. & R. 72, it was said by Tilghman, C. J., that a seal with a flourish of the pen "is not now to be questioned." Any kind of flourish or mark will be sufficient if it be intended as a seal. "The usual mode," said Tilghman, C. J., in *Taylor v. Glaser*, 2 S. & R. 502, "is to make a circular, oval, or square mark, opposite to the name of the signer; but the shape is immaterial." Accordingly it was held in *Hacker's Appeal*, 121 Pa. 192, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand, in *Taylor v. Glaser*, *supra*, a flourish was held not a seal, because it was put under and apparently intended merely as a part of the signature. So in *Duncan v. Duncan*, 1 Watts 322, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out.

These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended, and *a fortiori* the same result must be produced by writing the word "seal," or the letters "L. S.," meaning originally *locus sigilli*; but now having acquired the popular form of an arbitrary sign for a seal, just as the sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages' manuscript contraction for the Latin "et."

If therefore the word "seal" on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good

reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be canceled before signing. The pressure of business life and the subdivision of labor in our day, have brought into use many things ready-made by wholesale which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century, the act of sealing was commonly done by adoption and ratification rather than as a personal act, as we are told by a very learned and experienced, though eccentric predecessor, in language that is worth quoting for its quaintness: "Illi robus et aes triplex. He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal. * * * How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact, the circumflex is usually made by the scrivener drawing the instrument, and the word seal inscribed within it." Brackenridge, J., in *Alexander v. Jameson*, 5 Bin. 238, 244.

We are of the opinion that the note in suit was duly sealed.

Order opening judgment reversed and judgment reinstated.

CONSIDERATION

Definition of and necessity for consideration

LOUISA W. HAMER, APPELLANT, *v.* FRANKLIN
SIDWAY, AS EXECUTOR, ETC., RESPONDENT,
124 N. Y. 538 (1891).

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5000 and interest from February 6th, 1875. She acquired it through several *mesne* assignments from William E. Story, second. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, second; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on March 20th, 1869, in the presence of the family and invited guests he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of \$5000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years, and on January 31st, 1875, he wrote to his uncle informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of \$5000. The uncle received the letter, and a few days later, and on February 6th, he wrote and mailed to his nephew the following letter:

"BUFFALO, February 6, 1875.

"W. E. STORY, JR.

"Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5000, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will

please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. * * *

"Truly yours,

"W. E. STORY.

"P. S. You can consider this money on interest."

The nephew received the letter and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on January 29th, 1887, without having paid over to his nephew any portion of the said \$5000 and interest.

PARKER, J.: The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, second, on his twenty-first birthday in the sum of \$5000. The trial Court found as a fact that "on March 20th, 1869, * * * William E. Story agreed to and with William E. Story, second, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, second, the sum of \$5000 for such refraining, to which the said William E. Story, second, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed, but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit

to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forbore, or suffered by the party to whom the promise is made as consideration for the promise made to him." (Anson's Prin. of Con. 63.)

"In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." (Parsons on Contracts, 444.)

"Any damage or suspension or forbearance of a right will be sufficient to sustain a promise." (Kent, Vol. II, 465, 12th ed.)

Pollock, in his work on Contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is suf-

ficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor and the Court will not inquire into it; but were it a proper subject of inquiry we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

The order appealed from should be reversed and the judgment of the Special Term affirmed with costs payable out of the estate.

All concur.

Order reversed and judgment affirmed.

Surrender of right as a consideration

WHITE, EXECUTOR OF JOHN BLUETT, v. WILLIAM BLUETT,

23 L. J. R. Exch. N. S. 36 (1853).

The declaration contained a count upon a promissory note made by the defendant payable to the testator, and a count for money lent.

* * * And the defendant saith that the said J. Bluett was the father of the defendant, and that afterward, and after the accruing of the causes of action to which this plea is pleaded, and before this suit, and in the lifetime of the said J. Bluett, the defendant complained to his said father that he, the defendant, had not received at his hands so much money or so many advantages as the other children of the said

J. Bluett, and certain controversies arose between the defendant and his said father, concerning the premises, and the said J. Bluett afterward admitted and declared to the defendant that his, the defendant's, said complaints were well founded, and, therefore, afterward, etc., it was agreed by and between the said J. Bluett, and the defendant that the defendant should forever cease to make such complaints, and that in consideration thereof, and in order to do justice to the defendant, and also out of his, the said J. Bluett's natural love and affection toward the defendant, he, the said J. Bluett, would discharge the defendant of and from all liability in respect of the causes of action to which this plea is pleaded, and would accept the said agreement on his, the defendant's part, in full satisfaction and discharge of the said last-mentioned causes of action; and the defendant further saith, that afterward, and in the lifetime of the said J. Bluett, and before this suit, he, the said J. Bluett, did accept of and from the defendant the said agreement as aforesaid, in full satisfaction and discharge of such mentioned causes of action.

Demurrer and joinder.

* * * * *

POLLOCK, C. B.: The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, "I will cease to complain if you will not sue upon this note." Whereupon the father said, "If you will promise me not to complain I will give you up the note." If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say,

"Do not complain, and I will give you £5." It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, "Now if you will not make any more complaints I will not sue you." Such a promise would be like that now set up. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration. * * *

Judgment for the plaintiff.

Forbearance, disadvantage suffered, etc., as a consideration

MARY. BURGESSER *v.* WENDEL,

73 N. J. L. 286 (1906).

SWAYZE, J.: The district court found that the plaintiff had resided with the defendant prior to his marriage; that upon that event he provided another house for her, and promised to pay her a certain sum (afterwards fixed at \$10) weekly as long as she should continue to reside in the new house; that she was still residing in the house, and that the defendant had failed to pay the weekly allowance for ten weeks. He rendered judgment in favor of the plaintiff for \$80.

It is now argued on behalf of the defendant that the facts as found do not warrant the judgment, because they fail to show a consideration and because, to state the point in the language of the appellant's brief, "there was no agreement in this case as contemplated by the statute of frauds, because there was simply a voluntary payment with-

out consideration." Before the trial Court this objection was stated to be that the contract was not to be performed within one year.

We think the case shows an agreement and not a mere voluntary payment. There was an arrangement between the parties for a change of the plaintiff's residence, and upon this arrangement she acted. If this were not so the point was not made in the trial court, and cannot now be considered.

There was a legal consideration for the defendant's promise. The change of the plaintiff's residence may have been a benefit to the defendant, or a detriment to the plaintiff, or both. * * *

We find no errors, and the judgment must be affirmed, with costs.

MELROY *v.* KEMMERER, APPELLANT,
218 Pa. 381 (1907).

Opinion by Chief Justice Mitchell. It was said in *Ebert v. Johns*, 206 Pa. 395, that the rule that the acceptance of a smaller sum for a debt presently due, though agreed and expressed to be payment in full, is not a good accord and satisfaction, was a deduction of scholastic logic and was always regarded as more logical than just, and hence any circumstance of variation is sufficient to take a case out of the rule. As illustrations of such circumstances of variation, it has been held that payment a day or even an hour before the debt is due, or at a different place, or of a certainty in amount where the amount of the debt is uncertain, or payment of even a part by a third person, or additional security of any kind, such as the indorsement of a note by a third person, or payment in chattels or anything other than money, will be a good discharge of the whole by way of accord and satisfaction.

The rule itself is founded on the want of consideration for the agreement. As a part can never be equal to the whole, the payment of a part of the debt presently due gives the creditor nothing that he was not entitled to and deprives the debtor of nothing he was not bound to part with before, and therefore there is no consideration. The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it. As said in *Ebert v. Johns*, "to a merchant with a note coming due, \$5000 before three o'clock to-day which will save his commercial credit may well be worth more than \$20,000 to-morrow after his note has gone to protest." If the debt is not due until to-morrow the payment of the lesser sum under all the cases will be a good accord and satisfaction, but if the debt was due yesterday, but the debtor can only pay part to-day, the benefit to the creditor of getting that part now rather than the whole when it is too late, is just as great, and whatever conclusion the scholastic logic and theoretical reasoning may lead to, the importance of the practical result is a matter for the creditor to decide for himself, and having so decided and got the benefit of it, justice and common honesty ought to hold him to his agreement. For this reason, the force of which is universally accepted, the courts so far as they could without sacrifice of the maxim of *stare decisis*, have brought the law into closer accord with modern business principles.

In the present case the debtor being in failing circumstances and contemplating bankruptcy, offered the plaintiffs 30 per cent. of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money, and closed the account. They have now brought this suit for the balance. In the absence of any expressed decision in this State on this point, the learned judge below did not feel at liberty to depart from the general rule. We have no such

hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy and his payment of 30 per cent. instead, constitute a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt.

A valuable consideration may consist in some right, interest or benefit to one party, or some loss, detriment or responsibility resulting actually or potentially to the other; *Bouvier's Law Dict.* "If there is any advantage to the creditor the law will not say the adequacy of the consideration." *Fowler v. Smith*, 153 Pa. 639.

The accord in this case was good on both branches. By it the creditors got a sum certain, instead of the chance of an uncertain dividend in bankruptcy; on the other hand, the debtor accepted the responsibility of paying a sum certain whether his assets were sufficient or not, and gave up his right to a release of his future assets, and to a discharge from his whole debt without regard to the sufficiency of his present assets.

The decisions on this exact point in other States are not numerous, but the general trend is uniform to the result we have reached. In *Hinckley v. Arey*, 27 Me. 362, it was said by Tenny, J.: "In this case the plaintiff was informed that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard, took no further steps to obtain relief under the bankrupt law." It was accordingly held that the accord and satisfaction were good. In *Curtis v. Martin*, 20 Ill. 557; *Engbretson v. Seiberling*, 122 Iowa 522; *Rive v. London, etc., Mortgage Co.*, 70 Minn. 77, the courts went still further

and held the satisfaction valid where the debtor was insolvent or in failing circumstances, though there was no express intention to seek a discharge in bankruptcy. In the last named case it was held that an agreement on behalf of the estate of a debtor supposed to be insolvent was good, though it turned out in fact that it was solvent. And in *Pettigrew Co. v. Harmon*, 45 Ark. 290, the principle that part payment by a third person makes the accord valid was held to govern where the third person was one to whom the debtor had assigned his assets for the payment of his debts.

Judgment reversed.

WILLIAM E. SHERWIN AND OTHERS, TRUSTEES,
v. SAMUEL W. FLETCHER,

168 Mass. 413 (1897).

Contract on the following agreement:

"We, the undersigned subscribers, do hereby agree to pay the sum set against our respective names, the same to be payable under and in accordance with the following conditions, namely:

"1. The money by us subscribed is to be used for the purpose of erecting a building in the town of Ayer, to be used for the manufacture of boots and shoes.

"2. The details regarding the plan under which the subscribers hereto shall organize themselves, and upon which said building shall be erected and rented, shall be hereafter fixed and determined by a majority in numbers and interest of the subscribers hereto, at a meeting to be duly called for that purpose.

"3. No subscription hereto shall be binding until the sum of twelve thousand (\$12,000) dollars shall have been raised.

"SAMUEL W. FLETCHER. \$200."

The declaration alleged that the defendant signed the above contract (a copy whereof was annexed) and thereby agreed, in consideration of other parties signing similar agreements, to pay such person or persons as should be determined upon by the majority in numbers and interest of such subscribers the sum of \$200, upon the terms and

conditions therein specified and set forth; that the sum of \$12,000 was subscribed; that at a meeting of such directors duly notified and called for that purpose, it was determined by a majority in numbers and interest of the subscribers to organize, and they did so organize under the name of the "Ayer Building Association;" that the plaintiffs were duly chosen trustees, and by votes of said association were duly authorized and empowered to purchase a tract of land in the town of Ayer, and erect thereon a building for the manufacture of boots and shoes, and to collect all subscriptions; that, relying upon the promise of the defendant, and being so authorized as aforesaid, they did purchase a tract of land in the town of Ayer, and erect thereon a building for the manufacture of boots and shoes, and demanded of the defendant the amount of his said subscription, to wit, the sum of \$200, but the defendant refused and still refuses to pay the same.

The defendant demurred to the declaration, assigning as grounds therefor: 1. That it did not appear by said declaration and the contract annexed thereto that the defendant made any promise or agreement to pay the plaintiffs, or any promise or agreement upon which the plaintiffs were entitled to recover. 2. That the plaintiffs did not allege in their declaration, nor did it appear by the contract, that there was any sufficient consideration for the defendant entering into the contract.

The Superior Court overruled the demurrer; and the defendant appealed to this court.

ALLEN, J.: The demurrer to the declaration was rightly overruled. The written agreement signed by the defendant was virtually a promise to pay to such person or persons as should be fixed at a meeting of the subscribers. This promise was at the outset an offer, but when steps were taken in pursuance of Article 2, and a plan was fixed and determined as therein provided, and the plaintiffs were chosen trustees, they became the promisees: and when they

proceeded to erect a building in reliance upon the subscriptions of the defendant and others, and before any withdrawal or retraction by him, that supplied a good consideration, and the promise became valid and binding in law.

Judgment affirmed.

MARSHALLTOWN STONE CO., APPELLANT, *v.*
DES MOINES BRICK MFG. CO.,

114 Iowa 574 (1901).

Action on contract. A demurrer to the petition was sustained, and judgment rendered against the plaintiff. The plaintiff appeals.

SHERWIN, J.: The petition alleges that in August, 1898, the plaintiff was about to enter into a contract to furnish crushed rock for use in a certain street in Des Moines then about to be paved; that the defendant then agreed to pay plaintiff the sum of 25 cents per cubic yard for the crushed rock used in paving said street, on condition that the plaintiff would not enter into the contemplated contract nor sell any crushed rock in the city of Des Moines during the remainder of the year 1898; and that the plaintiff carried out the terms of this agreement. The demurrer assails the petition for want of consideration, and on the ground that the agreement was against public policy and void because tending to prevent competition.

The consideration for the agreement on the part of the defendant was sufficient. The plaintiffs agreed to and did refrain from entering into the contemplated contract, and refrained from selling crushed stone in the city of Des Moines during the remainder of the year 1898. It is to be presumed that the sale of stone in Des Moines would have been a benefit to the plaintiff, and that by not doing so he suffered a loss. Any forbearance practiced by a party

to a contract, or any detriment or loss suffered by him, is sufficient consideration for the other's promise. In the case of *Chapin v. Brown*, 83 Iowa 156, relied upon by appellee, the plaintiff sued for damages because the defendants had again entered the butter trade after agreeing not to do so. The plaintiff had clearly paid nothing for the promise, and upon the execution of the bare agreement, without the payment of a cent, he had at once established a lucrative business; hence had not foreborn or suffered anything.

The agreement was that the plaintiff would not enter into the particular contract contemplated for furnishing crushed stone for the particular job of paving then under way, and further that he would not sell said material in the city of Des Moines during the period of about five months. It was limited as to time, place, and commodity. So far as is shown by the petition, there was no attempt to restrain competition in furnishing that particular product. There might have been a large number of others anxious and willing to supply the public demand for crushed rock. Nothing appears therefrom which in the least indicates an intention to oppress or create a monopoly in that particular product. The contract was therefore not void as against public policy. In the *Chapin-Brown* case, *supra*, it appeared that all the merchants of Storm Lake had entered into an agreement, and it might well be said that it was a contract creating a monopoly, and hence against public policy.

The judgment is reversed.

Composition with creditors—Promise for a promise**ROBERT v. BARNUM.****80 Ky. 28 (1882).**

PRYOR, J.: The validity of agreements between creditors, entered into for the purpose of releasing an insolvent debtor, when made in good faith, cannot be questioned; and when the debtor has in this manner procured his release, and is willing and offers to comply with the terms of the agreement, there is no reason why it should not be enforced. The basis of settlement in this case was, that ninety per cent. of the creditors for merchandise sold the debtor should sign the composition agreement. Perfect equality, unless otherwise agreed upon, should exist between the creditors named, the one having no advantage over the other. The execution of the agreement by one creditor is the inducement for the others to do likewise. All agreeing to relinquish their claims for a particular purpose, that is, to relieve the debtor from his insolvent condition, and the agreement to release by one is a sufficient consideration for the release by the other. The creditors are the parties contracting for the relief of the insolvent, and when the latter complies, by paying or tendering the money, or whatever is required to release him from his obligations by the terms of the settlement composition, the creditor is bound to accept it. An agreement by the creditor with his debtor to take less than his debt, based on no other consideration than to relieve him from his pecuniary embarrassment, cannot be enforced; but when the creditors enter into an agreement with each other that they will relieve the debtor by releasing a part of their demands, the agreement can be enforced even by the debtor, who can accept the terms fixed by his creditors, and comply with the agreement. The creditors contracted with each other in this case to the effect that "they would accept twenty-five cents on a dollar cash, in full settlement of our claims to date. This paper is not binding

unless signed by creditors representing ninety per cent. of his merchandise indebtedness."

The creditors representing ninety per cent. of this indebtedness signed the agreement, and all of them have accepted the twenty-five cents on the dollar except the appellees. They say they are not bound by the agreement, because the appellee (the debtor) made an assignment of his property to a trustee for the benefit of creditors, after this composition agreement was entered into. This the appellee may have done for his own protection, or to bring about, if the composition agreement failed for want of the proper number of signatures, an equal distribution of his property or its proceeds between his creditors. The proof conduces to show that one creditor had at least attached his goods, and to prevent such preferences he made the assignment. There is no evidence of any fraud practiced by the appellee; but, on the contrary, he proceeded, after the assignment of his property, to obtain the requisite number of signatures in order to effect the settlement; and this having been done within a reasonable time, he proceeded to pay off his creditors under the composition agreement. He paid all but the two appellants, and they are now insisting that as his estate is amply sufficient to pay them, the other creditors being satisfied, there is no reason for holding them to the agreement. It is argued that this is a controversy between the creditor and debtor only, as all his other creditors are satisfied, and the debtor is able to pay them. The inquiry at once arises, what placed the debtor in a condition by which his ability to pay these two debts is unquestioned? The response is, the surrender by all of his creditors of their claims upon the payment of twenty-five cents on the dollar. The creditors' money is left with, or given to the debtor, by reason of the agreement the appellants are seeking to avoid. The chancellor, in allowing their claims in full, would be aiding the appellants to take an improper advantage of those with whom they had, in good faith, contract-

ed, by using their means, or what, as between the appellant and the other creditors, belonged in law and equity to the latter, to pay appellants' debts. They knew of the assignment by the appellee, or, if not, they knew of the acceptance by the creditors, or many of them, of the sum agreed on in full discharge of their debts, and neither a court of law or conscience should give them this advantage.

They had no more right in equity to this money than if they had made a secret arrangement with the appellee to pay their debts in full at the time they signed the agreement. The assignment of the estate of appellee for creditors did not change the relation of the parties. It placed the creditor in no worse condition, and even an absolute sale, if made in good faith, to enable the debtor to comply with the agreement, could not have been deemed fraudulent. It would be unjust to both the debtor and those of his creditors who had released their claims, to permit this defence. The obligation to comply was reciprocal, and no creditor signing the paper can disregard his agreement so as to prevent the equitable adjustment, and the chancellor will not hesitate to enforce it. The debtor may refuse to comply or decline by his acts to recognize the agreement, and if so, the creditor is not bound; we find no such refusal in this case.

Judgment affirmed.

Adequacy of consideration

BAINBRIDGE *v.* FIRMSTONE,
8 A. & E. 743 (1838).

Assumpsit. The declaration stated that, whereas, heretofore, to wit, etc., in consideration that plaintiff, at the request of defendant, had then consented to allow defendant to weigh divers, to wit, two boilers, of the plaintiff, of great value, etc., defendant promised that he would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect and complete a condition and as fit for use by plaintiff as the same were in at the time of the consent so given by plaintiff; and that, although in pursuance of the consent so given, defendant, to wit, on, etc., did weigh the same boilers, yet defendant did not nor would, within a reasonable time after the said weighing was effected, leave and give up the boilers in as perfect, etc., but wholly neglected and refused so to do, although a reasonable time for that purpose had elapsed before the commencement of this suit; and, on the contrary thereof, defendant afterward, to wit, on, etc., took the said boilers to pieces, and did not put the same together again, but left the same in a detached and divided condition, and in many different pieces, whereby plaintiff hath been put to great trouble, etc. Plea, *non assumpsit*.

DENMAN, C. J.: It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

PATTESON, J.: The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

SCHNELL v. NELL,

17 Ind. 29 (1861).

PERKINS, J.: Action by J. B. Nell gainst Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Indiana, and Donata Lorenz, of Frickinger, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of \$200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: \$200 to the said J. B. Nell; \$200 to the said Wendelin Lorenz; and \$200 to the said Donata Lorenz, in the following installments, viz., \$200 in one year from the date of these presents; \$200 in two years, and \$200 in three years; to be divided between the parties in equal portions of \$66 2-3 each year, or as they may agree, till each one has received his full sum of \$200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money (one cent) and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL (Seal)

"J. B. NELL, (Seal)

"WEN. LORENZ" (Seal)

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay \$600:

1. A promise, on the part of the plaintiffs, to pay him one cent.
2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.
3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of

indeterminate value. In this case, had the one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal consideration for Schnell's promise, on two grounds: 1. They are past considerations. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the

memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled.

PER CURIAM: The judgment is reversed, with costs. Cause remanded, etc.

Doing what one is legally bound to do—Contract obligation

STILK *v.* MYRICK,
2 Camp. 317 (1809).

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

LORD ELLENBOROUGH: I think *Harris v. Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of

consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the other might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship safely to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.

LEWIS F. F. ABBOTT v. VALENTINE DOANE, JR.,
163 Mass. 433 (1895).

Contract upon a promissory note for \$500, dated December 27th, 1892, payable in three months after date to the order of the plaintiff, and signed by the defendant. The answer set up want of consideration. At the trial in the Superior Court, before Bond, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The facts appear in the opinion.

ALLEN, J.: The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank,

and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait for a while, but that the defendant's interests were imperiled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, *sui juris*, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this Commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work the builder refused to proceed, but afterward, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised.

But when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him is requested to do so by a third person who is interested in such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding

him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration: A. enters into a contract with B. to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B., but rather for the benefit of others; as, e. g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B. may be executed or executory; it may be money, or anything else in law deemed valuable; it may be of slight value as compared with what A. has contracted to do. Now A. is legally bound only to B., and if he breaks his contract nobody but B. can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A. is legally bound, the motive to perform the contract may be slight. If after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene, and enter into a new agreement with A., by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A. accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfill their promise. They have got what they bargained for, and A. has done what otherwise he might not have done, and what they could not have compelled him to do.

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A. has refused or hesitated to perform an agreement with

B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of such request and promise by C. is a good consideration to support C.'s promise.

Exceptions overruled.

Doing what one is legally bound to do—Non-contract obligation

J. H. GUNNING v. J. P. ROYAL,
59 Miss. 45 (1881).

YOUNG, J.: For the purpose of carrying dirt from a hill which he was cutting down, the appellant hired a mare and cart from the appellee, who furnished an inexperienced negro boy for driver. While a fall was being made at one end of the work, the rule was for the cart to be loaded at the other. On one occasion the boy, although warned by a laborer of the appellant, drove to the wrong end where there was no dirt, but where the bank was ready to be caved, and while he was attempting to comply with another laborer's direction to turn the mare away, some earth accidentally fell, injuring the animal so that she was afterward killed. The appellee demanded \$150 for his loss. The appellant denied liability, but after a long dispute and an ineffectual attempt at arbitration, gave his note for \$66 in settlement of the controversy. When sued he pleaded want of consideration, and a jury being waived, the Court gave judgment for the plaintiff.

CAMPBELL, J.: The facts disclosed by the evidence acquit Gunning of all blame with respect to the injury to the mare and cart he had hired of Royal. He was, there-

fore, not legally answerable to Royal for the loss he suffered, or any part of it, and the giving of his note in settlement of the *controversy* did not preclude him from showing that he was not legally liable for the payment of the sum promised. The existence of a dispute or controversy between parties is not a sufficient consideration to support a promise to pay money in settlement of it, where no valid demand for anything whatever exists in favor of the promisee. There must be a valid demand to some extent, or for something, to uphold a promise of this kind. Giving a note to settle a dispute or controversy does not impose any liability on the maker, if he gains nothing and the payee loses nothing by it. In such cases it devolves on the maker of the note, when sued, to show the entire want of any consideration for his promise, and Gunning did so in this case.

SMITH *v.* WHILDIN,

10 Pa. 39 (1848).

Assumpsit on the common counts. The plaintiff, who was a constable in Philadelphia, proved that the defendant had offered him a reward of \$100 for the arrest of one M. Crossin, against whom warrants had been issued on a charge for obtaining goods under false pretenses. Under one of these warrants M. Crossin was arrested, in Philadelphia, by plaintiff's deputy.

CAMPBELL, J., told the jury the only question was, whether the plaintiff made the promise.

COULTER, J., (after stating the case): There was no consideration for the promise, and the court below therefore misconceived the law. It is the duty of a constable to pursue, search for, and arrest offenders against whom criminal process is put into his hands. It is stated in Com.

Digest, (title Justice of the Peace, B. 79), that the duty of a constable requires him to do his utmost to discover, pursue, and arrest felons. The office of constable is created not for the private emolument of the holder; but to conserve the public peace, and to execute the criminal law of the country. He is not the agent or employee of the private prosecutor, but the minister of the law, doing the work of the public, which he is bound to do faithfully for the fee prescribed by law, to be paid as the law directs. And it would be against public policy as well as against law to hold otherwise.

There are things which a constable is not officially bound to do, such as to procure evidence, and the like, and for this he may perhaps be allowed to contract. And this is the full extent of the principle in the case cited from 11 Ad. and El. 856. But it has been held that even a sailor cannot recover for extra work on a promise by the master to pay for extra work in managing the ship in peril, the sailor being bound to do his utmost independently of any fresh contract. *Stilk v. Myrick*, 2 Camp. 317, and the cases there cited.

It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecution. It ought not to be permitted. Constables must do their utmost to discover, pursue, and arrest offenders within their township, district, or jurisdiction, without other fee or reward than that given by the law itself.

Judgment reversed, and a *venire de novo* awarded.

Accord and satisfaction

EDWARD S. JAFFRAY ET AL., RESPONDENTS, *v.*
SIEGFRIED DAVIS ET AL., APPELLANTS,
124 N. Y. 164 (1891).

This was an action to recover a balance claimed to be due upon an indebtedness.

POTTER, J.: The facts found by the trial Court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on December 8th, 1886, for goods sold between that date and the May previous at an agreed price, the sum of \$7714.37, and that on the 27th of the same December the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to \$3462.24, secured by a *chattel mortgage* on the stock, fixtures, and other property of defendants, located in East Saginaw, Mich., which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this Court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English Court in 1602, when it was resolved (if not decided) in *Pinnel's Case* (5th Co. R. 117), "that payment of a lesser sum on the day in satis-

faction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numerous instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel's Case* (*supra*).

The steadfast adhesion to this doctrine by the *courts* in spite of the current of condemnation by the individual judges of the Court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine of the *Pinnel and Cumber and Wane case* (*supra*), they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the Court to settled law, and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration in a few of the numerous cases which the courts have held to be sufficient to support the new agreement. * * *

It was held in *La Page v. McCrea* (1 Wend. 164), and in *Boyd v. Hitchcock* (20 Johns. 76), that "giving

further security for part of a debt or other security, though for a less sum than the debt and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note endorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." (*Varney v. Commey*, 3 East. 25). And so it has been held "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditors," and so if "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction."

In *Watson v. Elliott* (57 N. H. 511-513), it was held, "it is enough that something substantial, which one party is not bound by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party, is held a good satisfaction."
* * *

It was held by the Supreme Court of Pennsylvania in *Mechanics' Bank v. Houston* (February 13th, 1882, 11 W. Note, case 389), "The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, is by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market," etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable.

It has been held that a payment in advance of the time if agreed to is full satisfaction for a larger claim not yet due. (*Brooks v. White*, 2 Met. 283).

In some States, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under

consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been cancelled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small."

And so in *Gray v. Barton* (55 N. Y. 68), where a debt of \$820 upon book account was satisfied by the payment of \$1 by calling the balance a gift, though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift, and this case was followed and referred to in *Ferry v. Stephens* (66 N. Y. 321).

So it was held in *Mitchell v. Wheaton* (46 Conn. 315), that the debtor's agreement to pay and the payment of \$150 with the costs of the suit upon a liquidated debt of \$299 satisfied the principal debt. * * *

The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed upon as follows, viz.: "That a creditor cannot bind himself by a simple agreement to accept a smaller sum in view of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement."

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiff, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and

this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiff such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any. * * *

Mutuality of consideration

FRANK E. VOGEL v. JOHN PEKOC,
157 Ill. 339 (1895).

CRAIG, C. J.: This was an action originally brought before a justice of the peace by John Pekoc, against Nelson Morris, Frank E. Vogel and Edward Morris, a firm doing business as Nelson Morris & Company, to recover the sum of \$25 for wages claimed to be due as a cooper. On a trial before the justice the plaintiff recovered the amount claimed, and the defendants appealed to the Superior Court of Cook County, where a jury was waived and a trial had before the court, resulting in a judgment for the amount sued for, and also attorney's fees. To reverse this latter judgment the defendants have appealed to this court.

The defendants requested the court to hold the following propositions of law, but the court refused so to hold, and this ruling is relied upon as error:

1. "That the evidence in the case is not sufficient, in law, to sustain a finding for the plaintiff.

2. "That the act providing for attorney's fees in suits for wages, approved June 1 and in force July 1, 1889, is unconstitutional and void.

3. "That the evidence in the case does not show a suit for wages, within the meaning of said act, and that no attorneys' fees can be allowed thereunder."

The evidence shows that plaintiff worked as a cooper for Nelson Morris & Co., and that there was a balance in their hands, for wages unpaid, of \$25. The defendants, however, claim that the amount said to be due was forfeited, for the reason that plaintiff quit the services of defendants without giving two weeks' notice, as they claim he was required to do under a contract in writing which they put in evidence, as follows:

"This agreement, made and signed this 12th day of September, 1892, between Fairbank Canning Company and Nelson Morris & Co., the parties of the first part, and John Pekoc, the party of the second part:

"Witnesseth, the said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part. And in consideration of such employment, and the peculiar nature of the business of the said first parties, and of the wages to be paid by the parties of the first part, the said second party agrees that he will not quit said service and employment without giving two weeks' notice, in writing, to said first parties of his intention so to do, and as a guaranty for the faithful performance of this agreement on his part, the said party of the second part agrees to deposit with said first parties the sum of \$25, and in case of the violation of this agreement by said second party the said first parties shall retain said amount as liquidated damages, and in satisfaction and payment of all

damages by them sustained. It is further agreed that the said first parties shall retain \$2.50 per week of the wages earned by said second party until said sum of \$25 shall be in their hands, to be held by them according to the terms of this agreement.

JOHN PEKOC. (Seal)
 _____ (Seal)
 _____ (Seal)

On the other hand, the plaintiff insists that the contract is void for the want of mutuality.

It will be observed that the written contract was not signed by the parties named therein as parties of the first part, and it is insisted by the plaintiff, that as they failed to sign the contract it never became binding on him or any other person. The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part, as held in *Johnson v. Dodge*, 17 Ill. 433. Regarding the contract in the same way, it would be treated as if it had been signed by the persons named as parties of the first part.

The next question to be determined is whether the contract is mutual. It is a general rule, well understood, that a contract between parties must be mutual. (*Weaver v. Weaver*, 109 Ill. 225; (*Tucker v. Woods*, 12 Johns 190). In the case last cited it is said: "In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent, and obligatory upon both at the same time." In *Chitty on Contracts*, the author says: "The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing, that if the one party never were bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void, for want of mutuality." In 1 *Wharton on Contracts*, page

5, the author says: "The parties to a contract therefore, must both be bound. Supposing that one promise in consideration of the promise of the other, the one is not bound unless the other is bound. A promise to do a thing on an executed consideration is not a contract; nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation no contract can be constituted. 'It is a general principle,' says Mr. Fry, 'that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other party, though its execution in the latter way might in itself be free from difficulty attending its execution in the former.'"

Upon looking into the contract read in evidence, it will be found that the parties of the first part practically agree to do nothing, and there is substantially no obligation imposed upon them by the contract. The only portion of the contract claimed to impose any obligation on the parties of the first part is the following: "The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part." What obligation does this impose? When are they to employ the party of the second part? What sum are they to pay? How long is the employment to continue? Suppose they refuse to employ the party of the second part; can an action for damages be maintained for a breach of the contract? The answer to these inquiries is obvious. We think it is plain that the parties of the first part were not bound, under the terms of the contract, to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him he was without remedy in any court of the country. It may be true that the plaintiff

might have entered into a contract which would require him to give two weeks' notice before he could quit the services of his employer without being liable to respond in damages, as might reasonably be provided in the contract; but no such case is presented by this record. Here the contract imposes no obligation on one of the parties, and hence it is void for the want of mutuality. * * *

The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained was a penalty or liquidated damages. * * *

MAGRUDER, J., dissented on other points in the case.

Past consideration and moral obligation

DANIEL MILLS *v.* SETH WYMAN,
3 Pick. (Mass.) 207 (1826).

This was an action of assumpsit brought to recover a compensation for the board, nursing, etc., of Levi Wyman, son of the defendant from February 5th to the 20th, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about twenty-five years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On February 24th, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the ac-

tion, directed a non-suit. To this direction the plaintiff filed exceptions.

PARKER, C. J.: General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform. This is a defect, inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services toward the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The

cases of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the commun-

ity in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant of the debtor discharged by the Statute of Limitations or Bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value; though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express prom-

ise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation; and it seems to follow, that a promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 B. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to his position, that

such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the Court to which is given jurisdiction on this subject. The legal liability does not arise, until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the non-suit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

HENRY POOL *v.* ALBERT N. HORNER ET AL.,
EXECUTORS,

64 Md. 131 (1885).

BRYAN, J.: The statement filed as a bill of particulars alleges that there was an agreement between the plaintiff below and the testator of defendants that for certain valuable considerations the said testator would buy a house and lot for plaintiff, and permit him to occupy it, and if plaintiff could obtain a larger price than the said testator paid for it that he would pay to the plaintiff what might be obtained for it, over and above the price originally paid for it. The consideration on the part of the plaintiff was that he gave a note for \$150 because of an old debt for \$125 which he owed the testator, and that he agreed to pay him annually the interest on the purchase money of the house and lot, and all taxes,

insurance and ground-rent thereon, and agreed to keep the house in good repair. The plaintiff paid the note and all interest due on it, and performed all the other stipulations of his agreement. The house and lot cost \$1465, and were sold at the desire and request of the plaintiff for the sum of \$1,700 by the testator, who received the purchase money and thereupon agreed to pay the plaintiff the sum of \$235, and afterwards on various occasions promised to pay the same.

The contract thus alleged was for the purchase of an interest in land, for the sale of it under certain circumstances, and for the payment to the plaintiff of a portion of the price received by the owner. Being by parol, it comes fully within the fourth section of the Statute of Frauds, as much so as that set up in *White, Adm'r, v. Coombs, Ex'r.*, 27 Md. 489. The plaintiff could not have maintained an action on this contract while it was executory, but the testator's express promise to pay after it was executed introduced a new feature into the transaction. It is stated in the notes to *Osbourne v. Rogers*, 1 Wms. Saunders, 264 b, as a settled rule "that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, express or implied, at the time of performing the consideration; but where there was an express request at the time, it would in all cases be sufficient to support a subsequent promise." This doctrine seems to have held uniformly ever since the case of *Lampleigh v. Brathwaite*, decided in the reign of James I and reported in 1 Smith's Leading Cases. The case is thus stated: the defendant having feloniously slain one Patrick Mahume required the plaintiff to endeavor to obtain a pardon for him from the king, and the plaintiff journeyed and labored, at his own charges and by every means in his power, to effect the desired object, and the defendant afterwards and in consideration of the premises promised to give the plaintiff £100; it was held that although the consideration was passed and gone before the promise was made, yet inasmuch as the consideration was moved by the previous suit, or request of the party, the

promise was binding and capable of sustaining an action. And in another case the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff £20, in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant; it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise was made, because the marriage ensued at the request of the defendant. *Dyer*, 272 b. So it seems to be clear that the payment of the note for \$150 by the plaintiff at the request of the testator and the performance of the other considerations by him are sufficient to support the promise made by the testator to pay the \$235.

New trial awarded.

Consideration must be possible

STEVENS v. COON,

1 Pinn. (Wis.) 356 (1843).

DUNN, C. J.: Error is brought in this case to reverse a judgment of the District Court of Jefferson County.

Coon, plaintiff below in action of assumpsit against *Stevens*, defendant below, to recover damages on a liability growing out of a contract which is in the words, etc., following, viz.:

"Astor, March 23d, 1839. In consideration of C. J. Coon entering the west half of the northwest quarter of section 35, in town. 13, range 13, I bind myself that the said eighty acres of land shall sell, on or before the first October next for \$200 or more, and the said *Coon* agrees to give me one-half of the amount over \$200, said land may sell for in consideration of my warranty. Hamilton Stevens."

"I agree to the above contract. C. J. Coon."

* * * On the trial, the above contract, and the receiver's receipt to said plaintiff *Coon*, for the purchase money for said tract of land described in said contract,

were read in evidence to the jury; and Abraham Vanderpool, a witness, testified "that he had visited that part of the country where the land lies, specified in said writing, and was upon the same, as he has no doubt, and estimated the present value of the same at \$150 per acre, and that in October, 1839, it might be worth \$125 an acre." Upon this evidence and testimony the plaintiff rested his case.

Under the construction put on the contract read in evidence, the jury found for the plaintiff \$116.50, in damages, and judgment was entered thereon. There is manifest error in this decision of the Court. From an inspection of the contract, it is obvious that it is not such an one, as is obligatory on either party. There is no reciprocity of benefit and it binds the defendant below to the performance of a legal impossibility, so palpable to the contracting parties, that it could not have been seriously intended by the parties as obligatory on either. The undertaking of the defendant below is: "that plaintiff's tract of land shall sell for a certain sum by a given day." Is it not legally impossible for him to perform this undertaking? Certainly, no man can in legal contemplation, force the sale of another's property by a given day, or by any day, as of his own act. The plaintiff was well apprised of the deficiency of his contract on the trial, as the testimony of his witness was entirely apart from the contract sued on, and was directed in part to a different contract; and such an one as the law would have recognized. If the contract had been that the tract of land would be worth \$200 by a given day, then it could have been recovered on, if it did not rise to that value in the time. The district court should not have entered judgment on the finding of the jury in this case. The construction of the contract by the district court was erroneous.

Judgment reversed with costs.

WESTERVELT, RESPONDENT, *v.* FULLER MFG.
CO., APPELLANT.

13 Daly N. Y. 352 (1885).

Appeal from a judgment of the District Court in the City of New York for the Sixth Judicial District.

LARREMORE, J.: This action was brought by the plaintiff to recover upon an alleged contract to pay him one hundred dollars for all his right and interest in a certain invention, he to sign all papers necessary to secure the patent.

The agreement commenced with the following recital: Whereas I am the inventor of "certain improvements in monkey wrenches." Five dollars were paid on the execution of the contract, by which it was stipulated that the further sum of ninety-five dollars should be paid thereafter. The plaintiff further agreed to sign all papers necessary to secure a patent for the invention, and to request and authorize the Commissioner of Patents to issue such letters patent unto the defendant, and to do all else that would be necessary to vest the title in said invention in the defendant.

No patent was ever obtained for the invention; and as appears from the evidence, none could be obtained, for the reason that an earlier patent for the same invention had been issued to another party.

If a patent had been issued upon the plaintiff's alleged invention, and the defendant had acted upon it, he would not have been allowed to question its legality, under the rulings in *Smith v. Standard Laundry Mach. Co.* (11 Daly 156); *Hyatt v. Ingalls* (49 N. Y. Super. Ct. 375); *Union Manuf. Co., of Norwalk, v. Lounsbury* (41 N. Y. 363).

It is apparent from the testimony in this case that the patentability of the invention was the consideration of the agreement referred to, and such patent not having been issued, there was a total failure of the consideration of the contract, which the plaintiff has never fully performed. For

this reason, I think the judgment appealed from should be affirmed.

Having reached this conclusion, it is unnecessary to consider the other points raised in the case.

Judgment affirmed, with costs.

Editor's Note.—An agreement to convey lands in consideration of certain slaves was made in 1863, and the vendor of the lands took a bill of sale of the slaves, executed by all the owners but one, who was a minor, and took possession of the slaves, and permitted the vendees to take possession of the lands, agreeing to convey as soon as the minor became of age, and conveyed to him his interest in the slaves. Before the minor became of age, the slaves were emancipated by the thirteenth amendment to the United States Constitution. *Held*, that the vendor was not entitled to recover the lands from the vendees, because of a failure of consideration.—*Calloway v. Hamby*, 65 N. C. 631 (1871).

Chapter III

CAPACITY OF PARTIES

CONTRACTS OF INFANTS

Infants' contracts for necessities

TUPPER *v.* CADWELL,
53 Mass. 559 (1847).

The plaintiff claimed of the defendant payment for labor done and materials furnished in rebuilding and repairing house \$300. The defendant filed a plea stating among other things that he was an infant. The jury found a verdict for the plaintiff for \$300. * * * Upon being inquired of by the court they stated that they had found the defendant to be a minor when the work was done, and that the whole of the plaintiff's work and materials were necessary. The defendant excepted.

DEWEY, J. : An infant may make a valid contract for necessities ; and the matter of doubt in the present case, is that what expenditures are embraced in the term "necessaries." In Co. Lit. 172 A. it is said, "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities and likewise for his good teaching or instruction, whereby he may profit himself afterwards." The term necessities, it is well settled, also embraces articles for the support of his wife and children, if he has such to maintain. The wants to be supplied are, however, personal, either those for the body as food, clothing, lodging or the like ; or those necessary for the proper cultivation of the mind, an instruction suitable and requisite to the useful development of the intellectual pow-

ers, and qualifying the individual to engage in business when he shall arrive at the age of manhood. * * *

No authority has been found, which in our opinion, sustains the position that a minor is liable for expenditures upon his real estate, of the character and under the circumstances here stated. No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs furnishes the proper occasion for the appointment of a guardian through whose agencies such repairs can be made, and, as the law assumes, more judiciously made, than through the agency of the minor. An infant is not liable for goods bought to furnish his shop, and to enable him usefully to continue trade, although he keeps a public shop. *Whittingham v. Hill* Cro. Jac. 494. In such cases, the law deems the infant incompetent to carry on business, and for that reason holds him not liable for articles furnished him for trade, irrespective of the questions whether, in the particular state of his business the addition to his stock was actually beneficial. That question is not open, in such cases. We think a similar rule prevails as to expenditures for improvements upon the real estate of a minor. The law deems him incompetent to make such contracts; and they not being of the class embraced in the term "necessaries," no legal liability arises for such expenditures, as against the infant personally. * * *

New trial ordered.

Voidable contracts of infants

JOHNSON *v.* LINES,
6 W. & S. 80 (1843).

* Error to court of common pleas. This was an action on contract by Lines and Scott against the administrator of John Johnson. The declaration contained the common money counts; to which the defendant pleaded infancy at the time of the supposed promise, and the plaintiffs replied that the goods provided were necessities. The defendant asked the court to charge, "That the plaintiffs had no right to deal with the minor even for necessities unless the guardian refused to furnish him with them." The court charged "that the plaintiffs had no right to deal with the deceased unless by the *permission*, express *or* implied, of the guardian; *or* unless the guardian refuses to furnish necessities to his ward." * * * Verdict and judgment for the plaintiffs.

GIBSON, C. J.: The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessities, but which ill deserve the name. Their account amounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessities when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessities. How they could reconcile such a verdict to the dictates of conscience, I know not.

* The facts are much abridged.

They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law on the subject be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man—which fit him for a useful life, or send him to an untimely grave; and public policy demands that they who deal with such a customer, should do so at their peril. This enormous bill was run up at one store; and what other debts were contracted for supplies elsewhere, we know not; but let it not be imagined that the infant's transactions with other dealers did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson, in *Burghart v. Angerstein* (6 Car. & P. 700), "you may look at the bills of the other tradesmen by whom the defendant was also supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessities suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessities proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril. In *Ford v. Fothergill* (1 Esp. R. 211; S. C. Peake's N. P. C. 299), Lord Kenyon ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parent or friends. That case may be thought to have been shaken in *Dalton v. Gib* (5 Bing. N. C. 198) in which it was held

that inquiry is not a condition precedent to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in *Brayshaw v. Eaton* (Id. 231) this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of nonsuit; but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and, consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward, ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case, the supply of articles which were proper in kind was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be *sui juris*; but I certainly do blame the jury for finding nearly the whole demand, after it had been conceded that he was an infant. * * *

Judgment reversed *venire facias de novo* awarded.

Editor's Note.—The following propositions may be regarded as settled: First, that an infant's contracts for necessities are as valid and binding upon the infant as the contracts of an adult, and such contracts cannot be disaffirmed, and need not be ratified before they can be enforced; second, the contract of an infant appointing an agent or attorney in fact is absolutely void and incapable of ratification; third, any contract that is illegal, by reason of being against a statute or public policy, is absolutely void and incapable of ratification; fourth, all other contracts made by an infant are voidable only, and may be affirmed or disaffirmed by the infant at his election when he arrives at his legal majority. *Fetrow v. Wiseman* (40 Ind. 148).

Executed contracts of infants

RICE, BY HER GUARDIAN, *ad litem*, RESPONDENT,
v. WM. BUTLER,
160 N. Y. 578 (1899).

HAIGHT, J.: The appeal in this case is based upon the certificate of the appellate division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the municipal court of Syracuse to recover the sum of \$26.25 paid by the plaintiff, a minor, 17 years of age, upon a contract for the purchase of a bicycle. The contract price was \$45; \$15 were paid upon the execution of the contract, and the remainder was to be paid in weekly instalments of \$1.25. The plaintiff purchased the wheel in June and used it until about the 20th of September, and then returned it to the defendant, asserting that she had been defrauded, and demanding repayment of the amount that she had paid upon the contract. The defendant took the wheel, but refused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial evidence was submitted on behalf of the defendant tending to show that the use of the wheel and its deterioration in value equalled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

It is now contended that the contract was executory, and that being such the plaintiff had the right to rescind and recover back the amount paid. * * * There are numerous authorities bearing upon the question, but they are not in entire harmony. * * * The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but insofar as the payments made were

concerned, the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent in his Commentaries (Vol. 2, page 240) says: "If an infant pays money on his contract and enjoys the benefit of it, and then avoids it when he comes of age he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other."

In the case of *Grey v. Lessington* (2 Bosw. 257) a young lady during her minority had purchased a quantity of household furniture paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court says: "When it becomes necessary for an infant to go into a court of equity, to cancel her obligations or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration."

In the case of *Medbury v. Watrous* (7 Hill 110) an action was brought by an infant to recover for services performed, of the value of \$70. The defense was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of \$600. He had not entered into the possession of the house and lot and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a *quantum meruit* for

the work performed. Beardsley, J., delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of *Holmes v. Blogg* (8 Taunt. 508), and says, with reference to the latter case: "It was not shown what had been the value of the use of the premises demised while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is, that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and fairness, to account for its reasonable use or deterioration in value. Otherwise she would be making use of the privilege of infancy as a sword and not as a shield. In the absence of wanton injury to the property the value of the use would be deemed to include the deterioration in value, and, under the evidence in this case, as found by the trial court, the use equaled the sum paid. Our attention has been called to the case of *Pyne v. Wood* (145 Mass. 558), but we think the rule suggested by us is more equitable and that it should not be followed.

Judgment reversed.

Editor's Note.—In *Gillis v. Goodwin* (180 Mass. 140) an infant had purchased a bicycle on time payments. After using the bicycle for some time, he disaffirmed the contract and sued for the money he had paid. It was held that he could recover and that the defendant was not entitled to anything for the rent and use of the bicycle while it was being used by the plaintiff.

An adult cannot enforce an executory contract with an infant upon which the former has advanced the consideration nor recover it in an action of *Assumpsit* where the consideration has been parted with by the infant. *Brawner v. Franklin*, 4 Gill (Md.) 463.

Effect of disaffirmance

CARR *v.* CLOUGH,
26 N. H. 280 (1853).

Trover for a horse. It appeared in evidence that the plaintiff and the defendant exchanged horses; and that upon the exchange, the plaintiff, a minor, being the owner of the horse in question, delivered the same to the defendant in exchange for a mare, which the defendant delivered to the plaintiff; the defendant at the same time agreeing to pay plaintiff the sum of \$10 on the following day. On the Monday next after the exchange, the plaintiff told the defendant he wanted to trade back, and the defendant said he would not do it unless the plaintiff would pay him \$15. The defendant then told the plaintiff that he would come up the next morning and pay the boot; but he did not do it. About three months later the plaintiff went to the house of the defendant taking the mare with him, and offered to return her to the defendant, and informed him that he would not abide by the trade, and requested the defendant to deliver him the horse in controversy. But the defendant refused to do it, saying that he would not let him have the horse, and would not receive back the mare. The mare was at that time in good condition, and of as great value as at the date of exchange. The defendant had sold the horse before the conversation last above mentioned. Verdict for plaintiff. It was agreed that judgment should be rendered on the verdict or the verdict set aside and new trial granted, according to the opinion of the court.

EASTMAN, J.: * * * If the subject of the sale be personal property, and a delivery to, and possession by, the vendee follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone beyond recovery, and in many cases for a very inadequate consideration. In such cases the principle of protection would be of little use,

could it not be exercised before maturity. We lay down the rule then that a sale and delivery of personal property by a minor, for a good consideration, but made without fraud by him, may be rescinded by the minor before arriving at full age (*Stafford v. Roof*, 9 Cow. 629, etc.), but if the infant rescinds the contract and seeks to recover the article sold by him, he must restore the property or consideration received before he can maintain his action for the property sold. This is but even handed justice, and the contrary doctrine would oftentimes enable the infant to use his minority for the perpetration of gross fraud. * * *

Badger v. Finney, 15 Mass. 363, was replevin, and the precise point decided was this: that where goods are sold to an infant on a credit and he avails himself of his infancy to avoid a payment, the vendor may reclaim the goods as having never parted with his property to them. In *Fitz v. Hall* (9 N. H. 441) it was held that if an infant disaffirms a contract by which goods have been sold to him, if he has the goods in his possession, and refuses to deliver them to the vendor upon a demand for that purpose, trover may be maintained against him for the conversion. The same case also lays down the principle, that where the property is passed from the hands of the infant, trover will not lie, although if there has been fraud practised by the infant, a special action on the case may be sustained. The doctrine upon this point is gathered from the weight of authority, and which seems to be founded in good reason, appears to be this. First, that the infant shall not be permitted to rescind his contract and recover the articles parted with by him without first restoring the property or consideration received therefor. Second, that in case of sale by an adult to an infant if the adult demands the payment or consideration promised by the infant, and he disaffirms the contract and refuses payment, or if suit be brought against him, pleads infancy and avoids the debt,

the adult may thereafter in case the property be in the infant's possession, maintain replevin therefor, or demand the property, and upon refusal bring trover and recover its value. If, however, the infant has parted with possession of the property sold him, the adult is remediless, provided there has been no fraud practised. It follows also in the absence of fraud where the contract is fully executed that until the same is rescinded the adult has the right to property which he has received, and has the right to make a bona fide sale of the same before the rescission.

Judgment on the verdict.

Return of consideration after disaffirmance

SAMUEL CHANDLER & ANOTHER v. CHAS. N. SIMMONS,

97 Mass. 508 (1867).

Writ of Entry in behalf of Samuel Chandler and John E. Chandler, as tenants in common, by their guardian, Weston Earle, to recover a tract of land in Dighton. Plea, nul disseisin, with an averment of title in the tenant.

WELLS, J.: These exceptions bring up the instructions under which the right of John E. Chandler to recover certain land was submitted to the jury. The defense was based upon a conveyance made by John E. Chandler while a minor, and ratified by him after he became of age. No question is made but that he is completely divested of his title, unless the pendency of proceedings against him as a spendthrift deprived him of the right to confirm his deed.

A deed obtained by undue influence, though voidable only by the party wronged, may be avoided by a guardian afterwards appointed. *Somes v. Skinner*, 16 Mass. 348. The rights of the ward are to be asserted in his own name; but upon the appointment of a guardian, all discretion as to

their exercise is taken from the ward and thenceforward intrusted to the guardian. A spendthrift under guardianship cannot even make an acknowledgment that will take his debt out of the statute of limitations. But his guardian may bind the estate of the ward by such an acknowledgment. *Manson v. Felton*, 13 Pick. 206-211. This is not denied as a general proposition, but it is contended that the right of a minor to avoid or affirm his deed stands upon a different footing; that it is a personal privilege to be exercised only by the minor himself. The case of *Oliver v. Houdlet*, 13 Mass. 237-240, is cited as authority to the point that the guardian of a minor cannot avoid his deed on the ground of minority. If that be so, it must be for the reason that the election, whether to avoid or affirm, is reserved to the minor until he shall be of age, and that a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward. It has indeed sometimes been held that the minor himself cannot avoid his deed until he is of age. *Bool v. Mix*, 17 Wend. 119. It is undoubtedly true that he cannot affirm it till then. But it is at least questionable whether he can be deprived of the right to re-enter or recover his property by suit while his minority continues. After he is of full age, if unable to exercise his privilege, by reason of mental or legal capacity, it seems reasonable and consistent with the nature and purpose of this right, that it should be exercised for him and in his name by the guardian who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs; and we cannot doubt that it may be also by a guardian appointed over his property for any cause for which adult persons are placed under guardianship.

Upon the second point it is urged that the deed of a minor may be confirmed by a mere waiver of the right to avoid, or by implication from his acts or even from his neg-

lect to exercise the right, and therefore that the confirmation of a deed, by which the title and seisin have already passed to the grantees, is not a contract, nor a sale or transfer of real estate, within the meaning of the statute. To this it may be answered that even a ratification by waiver, or implied from acts or from omission to avoid, requires in the party, whose right is thus determined, a mental and legal capacity to exercise the right and to bind himself by such act or omission to act. But the question here does not turn upon the precise designation to be given to the confirmation of a deed in the modes suggested. It relates to positive agreements or acts of release or waiver, by which the party deprives himself and those representing him of all right thereafter to avoid the deed and re-enter upon the estate. Such acts are certainly in the nature of contract, and require all the elements of a contract (except a new consideration), to give them effect. * * *

Another ground relied on by the defendant is that the deed cannot be avoided without a return of the consideration. We do not understand such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity, that this right is maintained. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same; and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. *Badger v. Phinney*, 15 Mass. 359. Or, if he retain and use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. *Boyden v. Boyden*, 9 Met. 519. But if the consideration has passed from his hands, either wasted or expended during his minority, he

is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or deliver to the minor in the same modes and with the same chances of loss in the one case as in the other. *Dana v. Stearns*, 3 Cush. 372-376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in statu quo. *Tucker v. Moreland*, 10 Pet. 65-74.

Upon the case as stated in the exceptions we are of opinion that the attempt of John E. Chandler to ratify his deed was ineffectual, and that it may be avoided now by his guardian without the previous return, or the offer to return, the consideration paid herefor. The ruling of the superior court appears to have been otherwise, and therefore these exceptions must be sustained.

Exceptions sustained.

Editor's Note.—To the same effect see *Mustard v. Wohlford*, 15 Gratt (Va.) 329.

The time for avoidance, by an infant, of sales, mortgages or other transactions affecting realty is after his arrival at majority. Prior to that time he cannot avoid his act, although according to some authorities he may even during infancy enter and take the profits of the land. 22 Cyc. 551.

Liability of infants for deceit

RICE *v.* BOYER,
108 Ind. 472 (1886).

ELLIOTT, C. J.: It is alleged in the complaint of the appellant, that the appellee, with intent to defraud the appellant falsely and fraudulently represented that he was twenty-one years of age, that, relying upon this representation the appellant was induced to sell and deliver to the

appellee, on one year's credit, a buggy and a set of harness; and that the appellee's representation was untrue.

To this complaint a demurrer was sustained and error is assigned on that ruling. * * *

The material and controlling question in the case is this: Will an action to recover the actual loss sustained by a plaintiff lie against an infant who has obtained property on the faith of false and fraudulent representation that he is of full age?

Infants are, in many cases, liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge Cooley says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it or omission of duty under it as a tort." * * *

"So if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley *v.* Torts 106, 107. Addison, following the English cases, says an infant is not liable "if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract, as well as a tort." Addison Torts 1314. Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. * * *

It is also firmly held that an infant is not estopped by the false representation as to his age; but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by the representation. Carpenter *v.* Carpenter, 45 Ind. 142. * * *

Our judgment is that where an infant does fraudulently and falsely represent that he is of full age he is liable in an action *ex-delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an

infant is not liable where the consequences would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong an equitable conclusion is reached and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age, is well sustained by authority, and it is strongly entrenched in principle, although, as we have said, there is a fierce conflict. * * *

There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley Torts 112. The cases certainly do agree; it is, indeed, difficult, if not impossible, to perceive how it could be otherwise, that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is, that he is liable to the extent of the loss actually sustained, for his tort, where recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. * * *

It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasonable diligence which is exacted in all cases, would warn the plaintiff of the non-age of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor, who is really twenty years and ten months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is twenty-one years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contracts, but for a loss occasioned by his fraud?

The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation, and it will not open the way to imposition upon infants, for, in no event, can anything more than the actual loss sustained be recovered, and no person who trusts, where fair dealing and due intelligence require him not to trust, can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for, in such a case, the action would be on the promise, and the only recovery that could be had for the breach of contract, and the terms of our rule forbid such a result, but it will apply where an infant, on the faith of his false and fraudulent representation obtains property from another and then repudiates his contract. * * * We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result

which the principles of justice forbid, for they require that it should be merely a shield of defense.

Judgment reversed with instructions to overrule the demurrer to the complaint.

CONTRACTS OF PERSONS MENTALLY DEFICIENT

What constitutes mental incapacity—Insanity

EUROPE A. LILY, APPELLANT, v. GEORGE WAGGONER, CONSERVATOR OF ELISHA WAGGONER, APPELLEE.

27 Ill. 395 (1862).

This suit was commenced by a bill in chancery, by George Waggoner as conservator of the estate of Elisha Waggoner, for the purpose of setting aside a conveyance of real estate made by Elisha Waggoner to the Appellant, Lily, in 1851, upon the ground that said Elisha was insane at the time of selling and conveying the property.

The bill alleges, that, in 1858 an inquest was held upon said Elisha Waggoner, and George Waggoner appointed as conservator of the estate of Elisha Waggoner, and that for a long period previous to the inquest, said Elisha was insane, and that during such insanity he conveyed the land described in the bill to Lily. Lily's answer admitted the conveyance and alleged that a full consideration was paid for the land; that he, Lily, is in possession of the land, * * * and that the said Elisha was not insane at the time of making the conveyance, but legally competent to make it.

WALKER, J.: Does the evidence in this case establish the fact, that Elisha Waggoner was of non-sane mind, so as to avoid his conveyance to appellant? It may be truly said, that there are few questions which present greater difficulties in their solution, than those of insanity. It as-

sumes such a variety of forms, from that of a raving mad man to the monomaniac; from total dementia, to that of scarcely perceptible insanity, that it has almost been denied, that any person is perfectly sane, on any subject. But the law only regards it, when it renders the subject *non compos mentis*, or that condition of the mental faculties exists which renders the subject incapable of acting rationally in the ordinary affairs of life. It is that degree of mental derangement which renders the person affected incapable of understanding the effect and consequences of his acts. It need not be of that total derangement, or rather obliteration of the faculties, which prevents the party from reasoning upon all subjects. Nor yet the want of power at all times upon correct premises, to arrive at accurate conclusions, but it is that want of power, which prevents a person from reasoning, or understanding the relation of cause and effect.

Persons of equal natural mental capacity from difference in education, pursuits and opportunity manifest different degrees of mental vigor. The law has never required the high order of reasoning powers that mark the gifted, or a large portion of the human family would be thus deprived of the legal capacity to transact their own business. But if the person manifest an ordinary degree of intelligence and judgment or even less, in reference to his business pursuits, and especially upon the subject in dispute, at the time of transaction, it is all that is required.

A person may be a lunatic and yet have lucid intervals, and the law has, at all times, held that a contract entered into, during a lucid period, is valid, while those made during a fit of insanity may be avoided. The reason is obvious, as a contract to be binding, must receive the assent of the parties. Not the mere formal assent, but the agreement of a mind capable of comprehending the nature of the transaction. Where one of the parties is *non compos mentis* he has not entered into the agreement, because his mind has not comprehended the nature of the transac-

tion, or the effect of his act. He lacks the mental capacity to understandingly give his assent to the transaction, while in a lucid interval, his mind acting with judgment, has understood the force and effect of his act. * * *

The legal presumption is that all persons of mature age are of sane memory. But after inquest found, the presumption is reversed until it is rebutted by evidence that he has become sane. When a transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it, but it is otherwise if it took place afterwards. In this case the conveyance was executed several years previous to the inquest, and the legal presumption is that the deed is valid unless the proof establishes insanity at the time of its execution. * * *

It appears to us that the evidence, on the part of the complainant, fails to establish the fact that the grantor was insane when the deed was executed. It may create doubt, but that is insufficient to overcome the presumption of sanity. To have that effect the evidence must preponderate, but if this were not so, appellant introduced eight witnesses, acquaintances of Waggoner, who saw and conversed with him, but at no time discovered any appearance of insanity, of which complainants' witnesses speak. Some of them purchased of him land or other property, but saw nothing to induce them to believe him insane. It appears, that immediately previous to the sale, Waggoner went, on two different occasions, to the house of one of the witnesses for the purpose of selling the land to appellant; that he then appeared to be rational. Noys testifies that he purchased of him a piece of land in April, 1851; had sold him goods, and had seen nothing strange or unusual in his conduct, and believed him to be competent to trade and make contracts at the time. This witness says, "he was about like the other Waggoners;" was always somewhat singular from the time he first knew him.

Decree reversed and bill dismissed.

Drunkenness**WRIGHT v. WALLER,****127 Ala. 557 (1900).**

McCLELLON, C. J.: This is an action by Wright against Waller on a contract in writing signed by the latter to pay rent. Defendant sought to avoid the contract on the ground that he was intoxicated when he signed it. There was evidence tending to show that the defendant was in a state of "complete drunkenness, dethroning reason, when he signed the paper;" and on the other hand, there was evidence tending to show that he was not drunk at the time. There was no evidence that plaintiff had anything to do with bringing about the defendant's intoxicated condition, if he was intoxicated, nor that defendant's mind was impaired by habitual drunkenness, nor that the contract was in itself unconscionable or unfair. On this state of the case the Court, in its general charge, said: "If the defendant was so much under the influence of strong drink, or intoxicating liquor, that his reason was dethroned to an extent that he could not give that attention to the signing of the note that a reasonably prudent man would be able to give, then the note would be void." And at the request of the defendant the Court gave the following charge: "If the jury find from the evidence that the defendant signed the note under such intoxication that he could not give proper attention to it, then the note is not evidence in the case, but void." To these instructions the plaintiff excepted, and their soundness vel non is the question presented on this appeal. * * *

The following are some of the statements of the governing principle applicable to cases like this found in the authorities: "* * * Intoxication so deep as to take away the agreeing mind, in other words to disqualify the mind to comprehend the subject of the contract and its nature and possible consequences, impair such contract if made while it lasts the same as insanity. But mere drunkenness, or being

a drunkard, or simply being drunk at the time, where the intoxication does not extend to the degree thus stated, will not impair the contract. To have this effect it must render the party *non compos mentis* for the occasion." Bishop on Contracts 980, 981. "The contract of a drunken person is voidable at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing." Anson on Contracts 150. * * * "Intoxication to the extent only that the party did not clearly understand" the business in hand "is not enough to render the contract voidable or void." Henry v. Ritenour, 31 Ind. 136. "It is also urged that the plaintiff in error is not bound by the transaction because he was drunk at the time he signed the note. We think the evidence shows that he was at the time drunk. But he was manifestly not so drunk but he knew what he was engaged in at the time. He, on the trial, testified to the circumstances attending the transaction. He says he took out the note and threw it down, and told them to take it and that they had better take his clothes. Had he been so drunk as to render the assignment void he could not have known or remembered what he did. To render the transaction voidable, he should have been so drunk as to have drowned reason, memory and judgment, and impaired the mental faculties to an extent that would render him *non compos mentis* for the time being." Bates v. Voll, 72 Ill. 108.

It is plain that the rule given in charge to the jury by the trial court in this case is a radical departure from the established and true rule obtaining in all such cases. * * * The charge given at the defendant's request should, therefore, have been refused. * * * Many perfectly sane and sober men could not bind themselves by contract at all, if the rule laid down there is a sound one. The law does not gauge contractual competency by the standard of mental capacity possessed by reasonably prudent men. A man is not incapacitated because of intellectual limitation arising

from intoxication or what not which prevent him from giving to a proposed contract all the consideration that a reasonably prudent man would be able to give it. Indeed, that test has no relation to mental capacity.

Reversed and remanded.

Editor's Note.—A contract entered into by a person who is so drunk as not to know what he is doing is voidable only and not void and may, therefore, become ratified by him when he becomes sober. *Carpenter v. Roger*, 61 Mich. 384 (1886).

Contractual power of persons lacking mental capacity

GRIBBEN *v.* MAXWELL,

34 Kan. 8 (1885).

This action was brought by Noah Gribben as guardian of Olive Gribben, a lunatic, against Maxwell to set aside a conveyance executed by Olive Gribben.

HORTON, C. J.: As a general rule, the contract of a lunatic is void *per se*, the concurring assent of two minds is wanting. "They who have no mind cannot concur in mind with one another; and as this is the essence of a contract, they cannot enter into a contract." *Powell v. Powell*, 18 Kas. 371. Notwithstanding this recognized doctrine, decided cases are far from being uniform on the subject of liability or extent of liability of lunatics for their contracts. * * * We think, however, the weight of authority favors the rule that where a purchase of real estate from an insane person is made, and a deed of conveyance is obtained in perfect good faith before the inquisition and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy and no advantage is taken by the purchaser, a consideration received by the lunatic must be returned, or offered to be returned, before the conveyance can be set

aside at the suit of the alleged lunatic or one who represents him.

In *Corbett v. Smith*, 7 Iowa 60. The Court states the law as follows: "In the next place, a distinction is to be borne in mind between contracts *executed* and contracts *executory*. The latter the courts will not in general lend their aid to execute where a party sought to be affected was at the time incapable, unless it may be for necessities. If, on the other hand, the incapacity was unknown, no advantage was taken, the contract has been executed, and the parties cannot be put in *statu quo*, it will not be set aside."

In *Berrins v. McKenzie*, 23 Iowa 333, the Court said: "But with respect to executed contracts, the tendency of modern decision is to hold persons of unsound mind liable in cases where the transaction is, in the ordinary course of business, fair and reasonable, and the mental condition is not known to the other party, and the parties cannot be put in *statu quo*."

In *Bank v. Moore*, 78 Pa. 407. A lunatic was held liable upon a note discounted by him at the bank. Among other things, the Court said: "Many insane persons drive as thrifty a bargain as the shrewdest business men without betraying in manner or conversation the faintest trace of natural derangement. It would be an unreasonable and unjust rule that such person should be allowed to obtain the property of innocent parties and retain both the property and its price."

Applying the law thus declared, to the case at bar, the district court committed no error in overruling the demurrer. It appears from the pleadings that the conveyance was executed and delivered before an inquisition and finding of lunacy; that no offer was made to return to the purchaser his money paid for the conveyance to the land; and the answer sets forth good faith on the part of the purchaser; that he paid a fair and reasonable price for the land; that he had no knowledge or information of the lunacy of

the ward of the plaintiff; but that there was nothing in her looks or conduct at the time to indicate that she was of unsound mind, or incapable of transacting business; but, on the contrary, that she was apparently in possession of her full mental faculties, and was then, and had been for a long time prior, engaged in the transaction of business for herself. * * *

Judgment affirmed.

Editor's Note.—In most cases by express statutory provision the deeds or other contracts of a person who has been judicially declared insane and placed under guardianship, are absolutely void and not merely voidable. 22 Cyc. 498.

CORPORATIONS

SLATER WOOLEN CO *v.* LAMB,

143 Mass. 420 (1887).

Action upon contract for goods sold and delivered.

Contract, upon an account annexed for goods sold and delivered.

FIELD, J.: If we assume that the truth of the exceptions has been established, we think that they must be overruled. The substance of the defendant's contentions is, that the Slater Woolen Company, having been incorporated "for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials," could not, by and in the name of persons who were in fact keeping a store as its agents, but whose agency was undisclosed, sell groceries, dry goods, and other similar articles to the defendant, who was not employed by the company, and then maintain an action against him to recover either the price or the value of the goods sold.

If the goods were the property of the plaintiff, and were sold by its agents, the plaintiff can sue as an undisclosed principal.

It was said of *Chester Glass Co. v. Dewey* (16 Mass. 94) in *Davis v. Old Colony Railroad* (131 Mass. 258, 273) that "The leading reason assigned was, 'the legislature did not intend to prohibit the supply of goods to those employed in the manufactory;' in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, 'Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since pointed out, wholly *obiter dictum*." But the weight of authority, we think, supports the last reason, given in its application to the facts of the present case. There is a distinction between a corporation making a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for the breach of an executory contract and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff.

If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were *ultra vires* of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals; the defect in them is, that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods, and retained and used them. Either the corporation must lose the value of its property, or the defendant must pay for it; in such an alternative, courts have held, on one ground or another, that an action can be maintained when the sole defect is a want of authority on the part of the corporation to make the contract. We think that the corporation can maintain an action of contract against the defendant to recover the value

of the goods. The defendant is not permitted to set up this want of authority as a defense; and as the form of the transaction was that of contract, such should be the form of the action.

We are not required to determine whether an action can be maintained to recover the price, as distinguished from the value of the goods, as no exception has been taken to the measure of damages.

Exceptions overruled.

Editor's Note.—A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on faith of the unlawful contract, to be recovered back or compensation to be made for it. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 60 (1890).

MARRIED WOMEN

WELLS v. CAYWOOD,
3 Col. 487 (1877).

THATCHER, C. J.: This was an action of ejectment brought by the appellee against the appellant in the court below. * * *

This brings us to the consideration of the question of the relation of husband and wife under the laws of this State, with respect to the independent acquisition, enjoyment, and disposition of property. The general tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law, to secure to each, untrammelled by the other, the full and free enjoyment of his or her proprietary rights, and to confer upon each the absolute dominion over the property owned by them respectively. The legislation of our own State upon this sub-

ject, although yet somewhat crude and imperfect, has doubtless been animated by a growing sense of the unjustly subordinate position assigned to married women by the common law, whose asperities are gradually softening and yielding to the demands of this enlightened and progressive age. The benignant principles of the civil law are being slowly but surely grafted into our system of jurisprudence. "In the civil law," says Sir William Blackstone (1 Blackstone's Com. (Cooley) 444) "husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts and injuries, and, therefore, in our ecclesiastical courts a woman may sue and be sued without her husband."

The courts—which have ever been conservative, and which have always been inclined to check, with an unsparing hand, any attempt at departure from the principles of the body of our law, which were borrowed from England,—in the States which were the first to pass enactments for the enlargement of the rights of married women, regarding such enactments, as a violent innovation upon the common law, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law-makers; but generally with a promptness that left little room for doubt, a succeeding legislature would reassert, in a more unequivocal form, the same principles which the courts had before almost expounded out of existence. To understand the marked changes which our own legislation has wrought in this respect, it is necessary that we should consider some of the disabling incidents and burdens attendant upon coverture at common law. At common law the husband and wife are one person, and as to every contract there must be two parties, it followed that they could enter into no contract with each other. "The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband,

under whose wing, protection and cover she performs everything." "Upon the principle of an union of person in husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by marriage." 1 Cooley's Blackstone 442.

All the personal estate, as money, goods, cattle, household furniture, etc., that were the property and in possession of the wife at the time of the marriage, are actually vested in the husband, so that of these he might make any disposition in his lifetime, without her consent, or might by will devise them, and they would, without any such disposition, go to the executors or administrators of the husband and not to the wife, though she survive him. Debts due to the wife are so far vested in the husband that he may, by suit, reduce them to possession. 2 Bacon's Abridgment 21. The rents and profits of her land during coverture belong to the husband.

The law wrested from the wife both her personal estate and the profits of her realty, however much it might be against her will, and made them liable for his debts.

An improvident husband had it in his power to impoverish the wife by dissipating her personal estate, and the profits of her realty over which she, under the law, by reason of the coverture, had no control.

The wife in Colorado is the wife under our statutes, and not the wife at common law, and by our statutes must her rights be determined, the common law affecting her rights, as we shall presently see, having been swept away.

By our laws it was declared that the property, real and personal, which any woman may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property that shall come to her by descent, devise or bequest, or be the gift of any person except her husband, shall remain her sole and separate property notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. R. S. 1868, p. 454.

The legislature, however, being reluctant to allow a married woman the absolute dominion over her own real property, further provided that she could only convey her estate in lands by uniting with her husband in any conveyance thereof, and acknowledging the same separate and apart from her husband. R. S. 1868, p. 111, Sec. 17.

It was not to be expected that our laws would long be permitted to remain in this anomalous and incongruous condition, declaring in one section that the wife's real property should remain her separate estate, not subject to disposal by her husband, and in another that she could not convey it without the consent of her husband, which is necessarily implied by his uniting in a deed with her.

By "an act concerning married women," approved February 12, 1874, it is provided in Section 1, that any woman, while married, may bargain, sell and convey real and personal property, and enter into any contract in reference to the same, as if she were sole. Section 2 provides that she may sue and be sued, in all matters, the same as if she were sole. Section 3 provides that she may contract debts in her own name, and upon her own credit, and may execute promissory notes, bonds and bills of exchange, and other instruments in writing, and *may enter into any contract* the same as if she were sole. Section 4 repeals Section 17 of Chapter 17 of the Revised Statutes, which required the husband to unite with the wife in conveying her separate estate. This is, essentially, an enabling statute, and as such must be liberally construed to effectuate the purpose of its enactment. It confers, in terms, enlarged rights and powers upon married women. In contemplation of this statute, whatever may be the actual fact, a *feme covert* is no longer *sub potestate viri* in respect to the acquisition, enjoyment and disposition of real and personal property. This statute asserts her individuality and emancipates her, in the respects within its purview, from the condition of thralldom in which she was placed by the common law. The legal, theoretical

unity of husband and wife is severed so far as is necessary to carry out the declared will of the law-making power. With her own property she, as any other individual who is *sui juris*, can do what she will, without reference to any restraints or disabilities of coverture. Whatever incidents, privileges and profits attach to the dominion of property, when exercised by others, attach to it in her hands. Before this statute her right to convey was not untrammelled, but now it is absolute without any qualification or limitation as to who shall be the grantee. Husband and wife are made strangers to each other's estates. There are no words in the act that prohibit her from making a conveyance directly to her husband, and it is not within the province of the court to supply them.

Chapter IV

REALITY OF CONSENT

MISTAKE

Mutual mistake as to subject matter

ABRAM RUPLEY ET AL. *v.* JOHN F. DAGGETT,
74 Ill. 351 (1874).

Appeal from the Circuit Court of Will County; the Hon. Josiah McRoberts, Judge presiding.

This was an action of replevin, brought by John F. Daggett against Abram Rupley and Jacob Rupley, to recover a mare which the defendants claimed they had bought of the plaintiff.

It appears that at the first conversation about the sale of the mare, Rupley asked the plaintiff his price, the plaintiff swearing that he replied \$165, while the defendant testified that he said \$65, and that he did not understand him to say \$165. In the second conversation Rupley says he told Daggett, that if the mare was what he represented her to be, they would give \$65, and Daggett said he would take him down next morning to see her. Daggett denied this, and says that Rupley said to him, "Did I understand you sixty-five?" Daggett states that he supposed Rupley referred to the fraction of the \$100, and meant sixty-five as coupled with the price named at the previous interview. He answered, "Yes, sixty-five." Both parties, from this, supposed the price was fixed. Rupley supposing it was \$65, and Daggett supposing it was \$165, and the only thing remaining to be done, as each thought, was for Rupley to see the mare and decide whether she suited him. The next day Rupley came, saw the mare and took her home with him. The plaintiff recovered in the court below, and the defendants appealed.

Scott, J., delivered the opinion of the Court.

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given him. He insisted, however, the price was \$65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his possession, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

Mistake of one party as to identity of other party

**SAMUEL A. STODDARD AND ANOTHER v.
JOSEPH HAM,
129 Mass. 383 (1880).**

Tort for the conversion of a quantity of bricks. Answer, a general denial. Trial in the Superior Court, without a jury before Pitman, J., who reported the case for the determination of this Court upon the following facts found by him:

The plaintiffs were manufacturers of and dealers in bricks, at Bangor, Me. The bricks in question were there purchased of the plaintiffs by Charles E. Leonard, who did a commission business in that city, but sometimes bought on his own account. The plaintiffs supposed they were selling these bricks to the defendant through Leonard as his agent; and they were sold on the credit of the defendant solely and would not have been sold on the personal credit of Leonard; but Leonard was not the agent of the defendant in this purchase, and had no authority to bind him. Leonard was not guilty of any false representations as to agency; and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing.

The bricks were bought upon short credit and were immediately sold by Leonard to the defendant, at a fixed price delivered in Boston, and were, in fact, bought with a view to such sale. The bricks remained in the plaintiffs' yard and possession until after the sale by Leonard to the defendant, and were afterwards delivered by the plaintiffs at a wharf in Bangor, as directed by Leonard, and by him shipped to the defendant, Leonard taking the bills of lading in his own name. Leonard sold other bricks to the defendant, at or about the same time, and drew drafts against the aggregate cargoes, which were accepted and paid by the defendant, who also paid the freight on account of Leonard.

From the proceeds, certain payments were made by Leonard to the plaintiffs, who supposed that they were made on the defendant's account, and they were credited to the latter. After the bricks were all delivered, Leonard failed in business, and no other payments were made. Leonard was largely indebted to the defendant, and he offset the claim of Leonard for the balance due him on the bricks by this antecedent indebtedness. After Leonard stopped payment, the plaintiffs made due demand on the defendant for the bricks, contending that they had never parted with the property in them, if the defendant repudiated the agency of Leonard; and offered to repay the defendant for all advances and expenses incurred by him; but the defendant refused to deliver them, and claimed to hold by purchase from Leonard. At the time of the demand, the defendant had on hand some of the bricks which came from the plaintiffs' yard; the others had been sold and delivered by the defendant as they arrived.

Upon these facts, the judge ruled, as matter of law, that the plaintiffs could not recover; and ordered judgment for the defendant. If the ruling was right, judgment was to be entered for the defendant; otherwise, the case to stand for a new trial.

COLT, J.: This case was tried without a jury, and there is no reason to doubt that, upon the facts found by the judge, it was correctly ruled that the plaintiffs could not recover in tort for the conversion of the property in dispute.

It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard, his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard. There was no fraud, no false representation of agency, or pretense on the part of Leonard that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly

bought the bricks for himself and sold them to the defendant as his own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him. The difficulty is that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. *Met. Con. 14*. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. *Foster v. Ropes*, 111 Mass. 10, 16. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract.

In *Boston Ice Co. v. Potter*, 123 Mass. 28, cited by the plaintiffs, there was no privity of contract established between the plaintiff and the defendant. There was no evi-

dence afforded in the conduct and dealings of the parties, that the defendant assented to any contract whatever with the plaintiff. A stranger attempted to perform the contract of another party with the defendant.

In *Hardman v. Booth*, 1 H. & C. 803, there was abundant evidence that the contract was with another party, to whom the goods were sent, and not with the person who obtained possession of them and sold them to the defendant. In *Mitchell v. Lapage*, Holt N. P. 253, the goods were expressly bought of a firm, which, without the knowledge of the broker, had been dissolved by the withdrawal of two of its members.

We are referred to no case which supports the claim here made by the plaintiffs.

Judgment for the defendant.

Mistake of one party as to terms of written contract

**SILAS R. HILL, RESPONDENT, v. THE SYRACUSE,
BINGHAMTON AND NEW YORK R. R. CO.,
73 N. Y. 351 (1878).**

This action was brought to recover damages for the alleged non-performance of a contract, entered into by defendant as a common carrier. The plaintiff delivered a quantity of wool at defendant's depot at Whitney's Point, to be carried to New York City. Plaintiff gave evidence tending to show that before the delivery of the wool he made a parol agreement with the person in charge of defendant's depot that the wool should be shipped by defendant within two weeks, and that upon the faith of such agreement the delivery was made. This evidence was objected to upon the ground that the agreement between the parties was in writing, and that oral evidence, changing or modifying the same, was incompetent. The objection was over-

ruled and defendant's counsel duly excepted. It appeared that afterwards, and on the same day, as plaintiff was about to start for his home, he received from defendant's agent, at the depot, receipts or bills of lading for the wool, but examined them no further than to see that the weights were correct, and then put them in his pocket, and did not notice the conditions therein until next day. By such conditions the defendant was exempted from liability arising from any delay. The wool was not shipped until nearly two months after. In the meantime, the value of the wool in market had fallen off nearly 30 cents per pound.

CHURCH, CH. J.: The decision of this Court in the recent case of *Ins. Co. v. R. R. Co.* (72 N. Y. 90) is decisive in this case that the receipt of bill of lading delivered to the plaintiff is to be regarded as a contract between the parties, instead of the parol agreement alleged to have been made previously, but on the same day, between the plaintiff and the person in charge representing the agent. The decision in *Boswick v. R. R.* (45 N. Y. 712) was not intended to impair the general and well-settled rule that when goods are delivered to a carrier for transportation, and a bill of lading or receipt is delivered to the shipper, he is chargeable with notice of its contents and is bound by its terms, and that prior parol negotiations cannot be resorted to to vary them. In that case the property had been shipped by the carrier before the bill of lading was delivered, and was beyond the reach or control of the shipper. This Court held that the carrier having shipped the property after the parol contract and before delivery of the bill of lading, was bound by the parol contract, and could not afterwards change it without the express consent of the shipper; but to apply the rule in a case like this would destroy the protection which the delivery and acceptance of a bill of lading affords. The delivery of the property and bill of lading are generally regarded as simultaneous acts, although the delivery of the

property necessarily precedes the making and delivery of the receipt or bill of lading, and in most cases some parol negotiations precede the delivery of the property.

In this case the receipt was made immediately after the receipt of the property, and delivered very soon after, the intervening time being while the plaintiff was getting his team preparatory to starting home. By accepting the contract without objection the other party had a right to assume that he assented to its terms, and the fact of not reading it cannot be interposed to prevent the legal effects of the transaction. It appears that in this case the plaintiff did, in fact, read the paper on the next day, and knew and understood its contents. If he was not satisfied with its terms, he had then abundant opportunity to reclaim his property or insist upon a modification of its provisions, but he did neither. If he relied upon the statement of the agent, that the property would be shipped within two weeks, it must have been upon faith in the opinion of the agent, and not as a binding contract with the company, as the bill of lading expressly notified him that station agents had no authority to vary or change the terms of a contract as expressed in the paper delivered. Although the receipt or bill of lading must be taken as the contract between the parties, there is nothing in its terms which will protect the company from liability if the delay and consequent loss was occasioned by its negligence, or that of its servants or agents. The record presents the case in a peculiar aspect. The complaint is on the parol contract to ship the property within two weeks. The trial Judge charged that the parol contract was binding and obligatory instead of the bill of lading, but charged also that unless the delay was produced by the negligence of the defendant or its agents the plaintiff could not recover. The General Term held that the evidence not being sufficient to establish *gross* negligence, the plaintiff could not recover on that ground, but also held that the parol contract was binding, and as the property was not

shipped within the two weeks specified, the plaintiff was entitled to recover.

Another embarrassment is that the refusal to the several requests to charge which were intended to present the point as to the binding force of the two contracts was excepted to in such a general form that it is doubtful whether in strictness it is available in this court. If the trial judge had ignored the parol agreement, the verdict could not be disturbed unless the case is destitute of any evidence to sustain the finding of negligence, because the defendant is liable if the injury was produced by its negligence. Nor is it necessary to establish gross negligence as the General Term seems to have supposed. A want of ordinary care by a carrier if it causes injury, is sufficient.

We think that there must be a new trial. The charge of the judge that the parol contract was a contract between the parties may have had a material influence upon the jury, upon the question of negligence, and although the exception to the request is not sufficiently specific, the same question was presented during the trial and an exception properly taken. If an amendment of the complaint is necessary, it can be obtained as a matter of course. Allegations of negligence would not substantially change the cause of action. The failure to perform either contract through negligence would be a breach of duty.

The judgment must be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

MISREPRESENTATION**Misrepresentation as to location of land**

NORMAN SPURR v. CALEB BENEDICT,
99 Mass. 463.

Bill in equity for an injunction on the defendant against prosecuting an action at law on a promissory note of the plaintiff, and for general relief in the matter of a purchase of land by the plaintiff of the defendant. The case was referred to a master, who found the facts hereafter stated; and was reserved on his report, by Gray, J., for the determination of the full court.

In the autumn of 1864 the defendant entered into a negotiation to buy from Sarah Wheelock a lot of forty-five acres of woodland, situated near the boundary line between Sheffield and Great Barrington; employed Lyman M. Merryfield, who owned the land adjoining, to point out the lot to him; and took a deed from Wheelock; dated October 17, 1864, supposing that it covered all the land pointed out by Merryfield; when in fact Merryfield was mistaken as to the boundaries of Wheelock's lot, and had pointed out to the defendant, as a part of it, some land adjoining a cleared field and an old public road, which did not belong to Wheelock and was not covered by her deed.

Later in the autumn, the defendant offered to sell the lot to the plaintiff, to whom he represented that it was situated in Sheffield, adjoined a cleared field and a good wagon road, "was all of it dry land, and very comfortable land to get timber off of," "would cut from fifteen to eighteen cords per acre," and that one "could go with a team on almost any part of it." And soon afterwards Henry Snyder, the plaintiff's agent, met the defendant, by agreement, for an examination of the land; and the defendant pointed out to him, as belonging to it, the land adjoining the cleared field and the road, "and one boundary, at least (a large rock), which was at some distance from his land." "As the

result of this examination, it was agreed, between Snyder and the defendant, that the defendant should convey the land to the plaintiff, who should give his note to the defendant in the sum of \$600." "Snyder wanted a warranty deed, which the defendant refused to give, but executed a quit-claim deed" without any covenant of title or warranty, "and left it with one Bradford to be delivered to the plaintiff when he should give his note for the \$600; and the plaintiff afterwards called and took his deed and left the note," which was made payable on demand. "Snyder's first offer to the defendant was, 'I will give you \$600 if you will survey the land out for me;' and the defendant replied, 'No, I will not do that;' and, either in this connection, or while they were upon the land, said, 'There are the minutes; you can survey it as well as I can.'"

The deed described the premises conveyed as a parcel of land in Sheffield, "being the same tract of land I purchased of Sarah Wheelock by her deed dated October 17, 1864," and referred to the Wheelock deed, or the record thereof, for a more particular description. The land which it covered was not situated in Sheffield, but in Great Barrington, a hundred and thirty rods north of the boundary line between the two towns; would not cut from fifteen to eighteen cords of wood per acre, but would cut, in part five or six cords, in part eight or ten, and in part twelve or fifteen cords; included some ledges of rock not accessible by teams, and also a swamp more than an acre in area; and did not adjoin any public road, but did adjoin a "wood road" along its southern boundary.

The land erroneously shown to Snyder as belonging to the lot included at least six or eight acres, would cut from twelve to fifteen cords of wood per acre, and, as above stated, adjoined an old public road (which, however, was but little used) and a cleared field.

During the ensuing winter, Snyder went upon the conveyed premises with a surveyor, to identify their bounda-

ries, but was unsuccessful in the effort; and by the direction of the plaintiff (who had never occupied or used the land,) he proposed to the defendant to return the deed and take back the note; but the defendant refused the proposal, and afterwards sued the note against the plaintiff; whereupon the plaintiff, who had fully discovered the mistake about the land, made tender to him of a reconveyance of the land and of indemnity against all expenses incurred by him in the suit on the note, and demanded of him a surrender of the note, on the ground of mistake in the contract; and upon his refusal filed this bill.

The plaintiff and Snyder were permitted to testify, before the master, against the defendant's objection, that if they had known the facts about the land, as afterwards ascertained, they would not have concluded the purchase; and the plaintiff further to testify that the fact alone that the land was situated in Great Barrington instead of Sheffield would have made a difference with him.

FOSTER, J.: There can be no doubt of the full equity jurisdiction of this court to set aside a conveyance of land, on the ground of mistake, where the vendor has undertaken to sell something which he did not own, and the estate embraced in the deed, although owned by him, is not that which the vendee intended to buy and supposed that he was obtaining by the conveyance. In such a case the equity for a rescission of the transaction does not depend upon any intentional fraud on the part of the grantor; and it is by no means limited to cases in which an action for deceit would lie at common law. Mistake is a head of equity jurisdiction distinct from fraud. Relief is granted on the ground that it would be unconscientious to oblige a man, who has not been himself negligent or in fault, to adhere to his bargain, and to retain property which he was induced to purchase by a misapprehension as to a material and essential circumstance, which he was led into by the conduct of the other party.

In the present instance, the defendant not only made exaggerated statements as to the value and quality of the land he proposed to sell, but he pointed out to the plaintiff's agent some land which he did not own, as embraced in the bargain, and one boundary which was at a considerable distance from the premises which he actually owned and conveyed by his deed. The land pointed out to the plaintiff's agent was of a better quality than that conveyed, would cut more wood, and corresponded with the description which the defendant had given to the plaintiff himself. All this appears to have been done innocently. Neither the purchaser, nor his agent, seems to have been negligent. They naturally relied on the vendor to point out the boundaries of his estate, and there was nothing in the deed to indicate that the land shown and conveyed was not the same. The defendant was himself mistaken as to what he owned, and consequently misled the plaintiff; and under the influence of this mutual error the transaction was consummated. But the prejudicial consequences to the purchaser are the same as if the conduct of the vendor had been designedly fraudulent. He has obtained, not what he expected to have, but something else which he did not intend to buy and would not have bought if he had known the truth. Of this we are satisfied, upon the report of the master; and it amounts to a case for equitable relief.

Nor is the fact that only a quit-claim deed was given any bar to the plaintiff's equity; because the mistake does not relate to the title obtained, but to the very subject matter of the contract. One parcel was bargained for and supposed by both parties to be embraced in the deed; another and different one was actually conveyed. The absence of covenants of title and warranty can make no difference; as their insertion would have afforded no protection against a mistake of this description. For a citation of the authorities, and discussion of this question, see *Earle v. De Witt*, 6 Allen 520. The plaintiff has already executed and tendered a reconveyance of the estate, and is entitled to a

Decree perpetually enjoining the defendant against prosecuting the action at law pending upon the note given for the purchase money.

Misrepresentation as to quality of chattel—Warranties

WOLCOTT, JOHNSON & CO. *v.* LEWIS D. MOUNT,
38 N. J. L. 496 (1875).

BEASLEY, C. J.: The plaintiffs in error sold to the defendant in error certain seed as and for "early strap-leaf red-top turnip seed." The seed, being planted, turned out to be a different kind, so that the defendant lost his crop. It was shown in the case that the plaintiffs in error believed, at the time of the sale, that the seed was of the kind which the defendant sought to purchase. The defendant in error brought his suit before a justice, on the ground that the sale to him, under these conditions, comprised a warranty. The decision was in his favor, and such judgment was affirmed in the Common Pleas, and, on certiorari, in the Supreme Court.

Therefore, the point before this court now is, whether, on the facts stated, the Court of Common Pleas could lawfully infer that the plaintiffs in error warranted the article sold to be of the particular kind for which it was purchased.

The subject of warranty, in its application to the class of cases in which the present one is comprehended, has been involved in much confusion. The authorities are not consistent, and they are very numerous. It has always seemed to me that a considerable part of this contrariety has arisen from a misapprehension with respect to what was decided in the famous case of *Chandelor v. Lopus*, Cro. Jac. 4. The only question in that case, as I understand it, was, as to the sufficiency of the averments in the declaration. The plaintiff's case appearing upon the record, is stated in the report in these words, viz.: "Whereas, the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezoar stone, and sold it to him for a hundred pounds; *ubi reuera*, it was not a bezoar stone." The

contention in the court of error, upon this record, was, that enough did not here appear to charge the defendant, because it was shown neither that he warranted it to be a bezoar stone, nor knew it to be such. Instead of a warranty being expressly laid in the declaration, a mere affirmation as to the kind of article sold, was laid, and it was this form of pleading which was adjudged to be bad. Now, an affirmation of this kind may or may not be a warranty, according to circumstances, and the fault of the pleading, therefore, was, that instead of a warranty, it set forth inconclusive evidence of a warranty. The pleader was bound to state the transaction according to its legal effect, and this was all that was decided. And such a form of statement, at the present day, would, I think, be deemed ill. * * *

The tendency of recent adjudications has been, I think, to put this subject on a reasonable footing. Starting from the admission that, in the absence of fraud and of a warranty, the rule of caveat emptor applies, the effort is, not to elevate particular expressions contained in a given contract into a general rule of law, but to regard each case in the light of its own circumstances, and with respect solely to the understanding of the parties. Whether the representation or affirmation accompanying a sale shall be regarded as a warranty or as *simplex commendatio*, is a question to be solved by a search for the intention of the contracting parties. The two cases of *Jendwine v. Slade*, 2 Espinasse 572; and *Power v. Barham*, 4 A. and E. 473, are conspicuous examples of this rule. In the former there was a sale shown of two pictures, the catalogue of the auction, describing one as a sea piece, by Claude Lorraine; and the other, a fair, by Teniers. This description was held by Lord Kenyon to be no warranty that the pictures were the genuine works of the artists referred to, but merely an expression of the opinion of the vendor to that effect. In the other case, it appeared that, at a sale of four pictures, they were described as "four pictures, views

in Venice-Carnaletti," and it was left to the jury to decide whether the intention was to warrant the pictures as authentic, the court distinguishing this case from the former one by the circumstance that Carnaletti was comparatively a modern painter, the authenticity of whose works was capable of being known as a fact, while, with respect to the productions of very old painters, an assertion as to their genuineness was necessarily a matter of opinion. In these instances the respective affirmations of the vendor were of equivalent import, intrinsically considered; but it was left open, as a matter of inference, whether they were to have the same signification when used under variant circumstances. The question consequently is, in every case of this kind, whether the conditions were such that the vendee had the right to understand, and did so understand, that an affirmation or representation made by the vendor was meant as a warranty.

And for the determination of this question, Mr. Benjamin, in his admirable *Treatise on Sales*, page 499, says: "A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter, not." * * *

Resorting, then, to the principle and test just propounded, it is manifest that the judgment of the Supreme Court cannot be disturbed. The Court of Common Pleas, in weighing the evidence, had a right to infer that a warranty of the character of the article sold was within the understanding of the contracting parties. The seller in this case asserted, at the time of the sale, that the seed was of the species which the vendee was in search of. When he made this express assertion, he was aware that the vendee could have no opinion for himself on the subject, for the case states that the seed could not be distin-

guished by sight or touch. The vendee also knew that the vendor could not be stating the result of his own observation. The facts do not admit of the imperative inference that the assertion of the vendor was mere commendation of his goods, or even that it was the utterance of his view as an expert. If the seller had stated the exact truth, he would have said that he had bought the seed as seed of the specified kind, but that he did not know whether it was so or not. Instead of doing this, he made the positive assertion in question. From such an assertion, under the circumstances in evidence, I think the court, although it was not bound so to do, had the right to infer that there was a warranty.

FRAUD

Statements not amounting to fraud

DEMING *v.* DARLING,
148 Mass. 504 (1889).

HOLMES, J.: This is an action for fraudulent representation alleged to have been made to one Dr. Jordan, the plaintiff's agent, for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant.

Among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds; and another was that the bond was of the very best and safest, and was an A No. 1 bond. With regards to these and the like, the defendant asked the Court to instruct the jury "that no representation which the defendant might have made or did make to Dr. Jordan in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it, with other bonds, even though false, were repre-

sentations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action;" and also, "that each of the expressions 'and that the same' (meaning said railroad and all the property covered by the mortgage) 'was good security for said bonds,' 'that said bond was of the very best and safest, and was an A. No. 1 bond, are expressions of opinion of value, and even though false, are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action.

The Court declined to give these instructions, and instead instructed the jury that "an expression of opinion, judgment or estimate, or a statement of a promissory nature relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. *Pike v. Fay*, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217) and as to which it always has been "understood, the world over, that such statements are to be distrusted." *Brown v. Castles*, 11 Cush. 348, 350; *Parker v. Moulton* also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first-rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. See, further *Veasey v. Doton*, 3 Allen 380; *Belcher v. Costello*, 122 Mass. 189. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectations have been disappointed.

* * * * *

Exceptions sustained.

What constitutes fraud

CABOT *v.* CHRISTIE, 42 Vt. 121 (1869).

Case for false warranty in the sale of a farm. Plea, not guilty. Trial by jury, May term, 1868, Barrett, J., presiding.

The plaintiff gave evidence tending to show that he bought the farm at the time and for the price stated in the declaration, and that the defendant made representation in respect to the number of acres, as of his own knowledge, designedly intending to induce the plaintiff to suppose and believe, and thereby the plaintiff was induced to and did suppose and believe, that the farm contained at least one hundred and thirty acres of land, and relying thereupon, the plaintiff made the purchase; that the defendant knew that there was not one hundred and thirty acres, or he didn't know that there was that quantity; that in fact there was

only one hundred and seventeen acres and a few rods in the farm; that the plaintiff had no knowledge of the quantity except from the defendant's representation.

The defendant gave evidence tending to show that he supposed there was one hundred and thirty acres and a little more in the farm, derived from what he had heard said, and from various deeds in his possession of various grantors and of various parcels, but that he did not know, and did not profess or represent to the plaintiff that he knew how many acres there were in fact; that he gave the plaintiff all the information and sources of information he had on the subject, neither making any false representation, nor fraudulent concealment, nor any undertaking as to the number of acres in the farm. There was no evidence or claim that the farm was sold by the acre; but it appeared that it was sold in lump, or as a farm entire.

* * * * *

The jury returned a verdict for the defendant. The plaintiff excepted to the charge. * * *

The opinion of the Court was delivered by

STEELE, J.: 1. The plaintiff cannot recover upon the ground of a parol warranty of the quantity of the land. If the quantity was warranted it should be provable by the deed. It is true that a deed of conveyance need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties. But it does purport to contain the covenants of the grantor with respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proved in respect to an ordinary bill of sale of personal property.

Nor is the plaintiff entitled to recover in this action upon the ground of mistake. A mutual and material mistake, by which the purchaser was misled as to the quan-

tity of land, would be a more appropriate ground for relief in a court of chancery than in a court of law.

If, then, the plaintiff was entitled to recover at all in this case, it was by reason of some fraud on the part of the defendant by which the bargain was induced.

2. The plaintiff complains of the ruling of the County Court upon the subject of fraud. It is conceded that the quantity of land was represented incorrectly. The Court properly told the jury that this, in itself, would not amount to fraud. To entitle the plaintiff to a recovery upon that ground, the defendant must have made some representation upon the subject that he did not believe to be true. The plaintiff claims, and his evidence tended to prove, that the defendant did make such a representation by stating the quantity of land as a matter within his own knowledge, when, in fact, as the defendant concedes, it was a matter upon which he had only a belief. We think it very clear that a party may be guilty of fraud by stating his belief as knowledge. Upon a statement of the defendant's mere belief, judgment, or information, the plaintiff might have regarded it prudent to procure a measurement of the land before completing his purchase. A statement, as of knowledge, if believed, would make a survey or measurement seem unnecessary. A representation of a fact, as of the party's own knowledge, if it prove false, is, unless explained, inferred to be wilfully false and made with an intent to deceive, at least in respect to the knowledge which is professed. A sufficient explanation however sometimes arises from the nature of the subject itself, or from the situation of the parties, being such that the statement of knowledge could only be understood as an expression of strong belief or opinion. But the quantity of land in a farm is a matter upon which accurate or approximately accurate knowledge is not at all impossible or unusual. If the defendant had only a belief or opinion as to the quantity of land, it was an imposition upon the plaintiff to pass off such belief as knowledge. So, too, if he made an absolute representation

as to the quantity, which was understood and intended to be understood as a statement upon knowledge, it is precisely the same as if he had distinctly and in terms professed to have knowledge as to the fact. It is often said that a representation is not fraudulent if the party who makes it believes it to be true. But a party who is aware that he has only an opinion how a fact is, and represents that opinion as knowledge, does not believe his representation to be true. As is well said in a note to the report of the case of *Taylor v. Ashton*, 11 Mees. & Wels. 418 (Phila. ed.), the belief of a party to be an excuse for a false representation must be "a belief in the representation as made. The *scienter* will, therefore, be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion, with regard to facts of which he was aware that he had no such knowledge." The same principle of law has been repeatedly recognized.

In the case before us the plaintiff, under the charge of the Court, was denied the benefit of this rule of law, although there was evidence tending to show every necessary element of a fraud of the nature we have been considering. The plaintiff's request was refused, and the jury were instructed that the plaintiff could only recover in case they found "that the defendant represented the quantity of land different from what he knew or believed to be true." Under these instructions it would be immaterial whether he made the representation as a matter of knowledge or as a matter of opinion so long as he kept within his belief as to the quantity of land. In this we think there was error. The Court properly instructed the jury that the representation, to warrant a recovery, must have been relied on and have been an inducement to the purchase. The subsequent remark that the jury, to hold the defendant, must find that the plaintiff would not have made the purchase but for the representation, we regard as probably inadvertent.

What the plaintiff would have done but for the false representation is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate and did operate as one of the inducements to the trade, it is not necessary to inquiry whether the plaintiff would or would not have made the purchase without this inducement.

The judgment of the County Court is reversed and the cause is remanded.

ROBERTS v. FRENCH,

153 Mass. 60 (1891).

Contract for money had and received by the defendant to the plaintiff's use. Trial in the Superior Court, before Thompson, J., who ruled that the plaintiff was not entitled to recover, and after a verdict for the defendant, reported the case for the determination of this Court. The facts appear in the opinion.

HOLMES J.: This is an action to recover two hundred dollars paid by the plaintiff as part payment of the price of a lot of land for which he made the highest bid at a sale by auction. The advertisements described the lot as containing about eleven thousand square feet, and as extending one hundred and thirty feet on the east. The plaintiff's evidence tended to show that at the sale one of the firm of auctioneers read the advertisement and said that the defendant's husband and himself had measured the land (as they had done), and that its dimensions were as stated in the posted bill, except as to the easterly line, which was only one hundred and seven feet long. The other auctioneer then proceeded to sell the property, and said that the easterly line was one hundred and seven feet long; that the lot contained about eleven thousand square

feet, and that a warranty deed would be given. The sale took place on the premises; the plaintiff was familiar with them, and he understood that he was buying only the land enclosed by the fences. But, according to his evidence, he believed the statements of the auctioneers as to the length of the lines and the area, and made his bid relying upon them, and we may fairly say by inference, being more or less induced by them to purchase. The easterly line in fact was only ninety-five and a half feet long; the other lines varied somewhat from the lengths given at the sale, and the contents were seven thousand seven hundred and sixty feet, being five hundred and sixty-five feet less than what they would have been if the length of the lines stated at the sale had been correct. The defendant has not offered a deed describing the premises as they were described by the auctioneer, but only a deed describing them correctly. The Court below ruled that the action could not be maintained; and the plaintiff excepted.

On the foregoing evidence plainly the jury might have found that the auctioneer made a misstatement of fact as to the length of the easterly line, and also represented that he made the statement on the faith of his own senses, because, as he said, he and the defendant's husband (who, by the way, was also her agent, and was present and assenting to what the auctioneer said) had measured the line. In other words, the statement of the length was a statement, as of the party's own knowledge, of the kind which our decisions pronounce fraudulent. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. Notwithstanding the plaintiff's knowledge of how the land looked, the jury also might have found that the statement in fact deceived him, and induced him to buy, and that it materially varied from the truth. It is true that the agreement was to buy a lot with known boundaries, and very likely in absence of fraud, the rule would apply that monuments govern distances in such agreements and in deeds with warranty. But that is only a rule of construction; it does not mean that meas-

urements are not material, or that a man who knows the monuments cannot be deceived about them. Of course, it was not necessary that the plaintiff's belief as to the length should have furnished his only motive for buying, if it furnished one motive, *Safford v. Grout*, 120 Mass. 20, 25; and if the defendant's agents knew that the representation would affect action on the part of the bidders, or if under the known circumstances it manifestly was likely to do so.

The rulings of the Court below probably assumed all that we have said, but was based on the cases which hold fraudulent representations as to the contents of a piece of land, the boundaries of which are pointed out to the buyer, not to be actionable. *Gordon v. Parmelee*, 2 Allen 212.

'We do not mean to question these decisions in the slightest degree, but it is obvious that there must be a limit beyond which fraudulent representations cannot be made with impunity; and upon the whole we are of opinion that, if the plaintiff's evidence it is believed, the representations made to him, under the circumstances in which they were made, went beyond that limit. When a man conveys "the notion of actual admeasurement" still more, when he says that he has measured a line himself and has found it so long, his statement has a stronger tendency to induce the buyer to refrain from further inquiry than a statement of the contents of a lot without giving grounds for the estimate. If false, it is a grosser falsehood. It purports on its face to exclude the suggestion that it is a mere estimate which the other leaves open. If it is made at a sale by auction, where it is out of the question for a bidder to go and verify it before making his bid, it seems to us reasonable to say that the purchaser has a right to rely upon it, as was held in a very similar case in Connecticut. *Stevens v. Giddings*, 45 Conn. 507.

New trial granted.

MITCHELL, C. J., IN *INGALLS v. MILLER*,
121 Ind. 191 (1889).

Whether the alleged representations were such as the plaintiff had a right to rely upon, or whether they were of a character reasonably calculated to deceive such a person as he was, were questions of fact for the jury. Representations might be futile and harmless when addressed to an active, sagacious, well-informed man, and yet the same scheme might utterly undo a weak-minded, illiterate, old, or inexperienced man. "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves." *McKee v. State*, 111 Ind. 378 (381).

The law is not blind to the fact that communities are composed of individuals of several degrees of intelligence and capacity, nor does it declare as matter of law what representation as to existing facts may, or may not, be relied upon.

Damage—a necessary element of fraud

NYE v. MERRIAM,
35 Vt. 438 (1862).

Case for fraud, in cheating in weighing a quantity of butter sold by plaintiff to defendant.

Plaintiff's evidence tended to prove that he sold defendant eleven tubs of butter at a specified price per pound; that the butter was delivered by plaintiff's father in plaintiff's absence; that defendant weighed the butter in presence of the father, and cheated in the weighing, marking a false weight on each tub and also on a slip of paper given to the father.

Plaintiff subsequently met the defendant at Lebanon, N. H., and called upon him to pay the balance due for the butter. In relation to what took place between the plaintiff and the defendant on this occasion, the plaintiff testified as follows:

"The defendant felt bad because he could not pay me. I said if he could not pay me he must give me his note, as I had nothing to show. He asked how much it was. I told him, I did not know, but supposed he could tell. He said he could not, that his papers were in his valise or trunk. I said I supposed it was about sixty dollars; he thought it was fifty-five or sixty dollars. I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented, and gave me his note for sixty dollars, and I came home. I had lost the paper that my father gave me, and did not know what the figures were. There was not a word said between us about fraud in the weight, and no allusion to it whatever."

Defendant's evidence tended to prove (among other things) that the note was given to cover and settle not only for the balance due for the butter, but also for plaintiff's claim for being cheated by the defendant in the weight.

The Court charged the jury that if the plaintiff satisfied them that the defendant purposely cheated in weighing the butter, still, if the plaintiff's claim for such fraud was mutually settled and adjusted by the parties, and included in said note, it would be a defense to the action, but that if the note was given merely in settlement of the balance due to the plaintiff for his butter, at its reported weight by the defendant, and with no reference whatever to the plaintiff's having been cheated by the defendant in the weight, then the plaintiff's right of action for such fraud was not thereby barred, even though the note given was large enough to cover the whole of the butter received by the defendant at the contract price; that if the facts in reference to the settlement and giving of the note were just as stated by the plaintiff, they would not amount to a settlement of the fraud in the weight, if such existed.

Defendant excepted to the charge. *Verdict for plaintiff.*

ALDIS, J.: The jury have found that the defendant attempted to cheat the plaintiff in the weight of his butter; that he reported the weight to the plaintiff's father, and marked the tubs at from twenty to thirty pounds less than the true weight. The plaintiff was not present when the butter was weighed, and therefore had to rely on the paper the defendant gave his father containing the figures of the weight.

I. If the plaintiff settled with the defendant for the butter upon the basis of the weight as reported by the defendant, and afterwards discovered the fraud, he would, it is admitted, be entitled to recover for the fraud.

II. But the defendant claims that the case, standing on the plaintiff's testimony, shows that the plaintiff has suffered no damage; that although the defendant may have attempted a fraud, yet in fact he has not accomplished his attempt; but on the contrary, has given his note to the plaintiff on settlement for more than the value of the butter at its true weight and contract price.

To sustain this action there must be both fraud and damage. A naked lie that causes no injury to another is not actionable. The lie must be relied upon, and must occasion damage.

The defendant claims, first, that the lie was not relied upon; and, secondly, that it did no damage, according to the plaintiff's own testimony; and that this view of the case was not presented to the jury. To determine this point we must consider the plaintiff's testimony, and the charge of the Court in regard to it.

The plaintiff, hearing that the defendant was about to go to California, and not to return to pay for the butter, went in search of him, and after going to New York and Boston, found the defendant at Lebanon, New Hampshire.

He called on the defendant for payment of the balance due for the butter. The defendant said he had no money. The plaintiff replied: "If you cannot pay me you

must give me your note." "He, the defendant, asked how much it was. I told him I did not know, but supposed he could tell. He said that he could not; that his papers were in his valise. I said I supposed it was about sixty dollars. He thought it was fifty-five or sixty dollars."

It will be noticed that thus far nothing has been asked for by the plaintiff, or spoken of by either, but "payment of the balance due for the butter;" and that what that balance was, was what neither could exactly tell,—the plaintiff supposing it "about sixty dollars," and the defendant "fifty-five or sixty." The plaintiff then proceeds: "I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented and gave me his note for sixty dollars." It is admitted that this note was large enough to cover the full amount of the butter at the contract price.

The plaintiff further said that he had lost the paper that his father gave him, and did not know what the figures were.

Now, upon this evidence it is clear that the defendant might justly have urged upon the jury, first, that the note was given solely for the balance due for the butter; that the remark as to his trouble in hunting after the defendant was not intended by him, or understood by the defendant, as making those expenses or that trouble a part of the consideration of the note, but only as entitling him equitably or morally to have the defendant's doubt whether the balance was fifty-five or sixty dollars solved in the plaintiff's favor. If given solely for the balance due for the butter, and it covered the whole balance according to true weight and contract price, we are at a loss to see what damages occasioned by the original false statement of the defendant has accrued to the plaintiff. The plaintiff does not appear to have incurred any expense or trouble on account of the falsehood, or to have lost anything by it. He did not go in search of the defendant on account of it. The attempt to cheat was not consummated by payment or settlement at the lower weight.

Had he known all the facts as to the attempt to cheat, he could not have asked for more than the sixty dollars as the balance due him for the butter. Nor does it appear that the falsehood had worked him any injury for which he could have asked for further compensation.

Secondly, the defendant might also have justly insisted that to sustain this action the plaintiff must show that he relied upon the false statement in making the settlement.

The testimony of the plaintiff might fairly be claimed by the defendant as tending to show that the plaintiff could not recollect what the statement originally made by the defendant as to the weight was; that the plaintiff had lost the paper which the defendant gave to his father, and had forgotten its contents; that the defendant could not tell what the weight was, and did not renew or insist on the original falsehood; and that both parties acted on their own knowledge and judgment as to the weight, uninfluenced by the false statement of the weight as originally made.

If the plaintiff did not recollect the false statement,—did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded.

The Court in the charge did not present the case to the jury in these two aspects, but seemed to hold that the original falsehood necessarily included damage, and gave a right of action for fraud in weighing, and that, unless such right to sue was discharged in the settlement, it remained in full vigor, and that the plaintiff's testimony did not show it settled. For the reasons above given we think the charge erroneous, and that the judgment must be reversed.

Judgment reversed.

UNDUE INFLUENCE

Contracts between persons related

TUCKE ET AL. v. BUCHHOLZ,
43 Iowa 415 (1876).

BECK, J.: The defendant married the mother of plaintiffs, who was then a widow, when the eldest of them was about nine years of age. From this time until they reached their majority he stood in the place of a father and exercised parental authority and control over plaintiffs. Their father died seized of the land in controversy, and devised to their mother a life estate therein, with remainder to the plaintiffs. Defendant, after his marriage with plaintiffs' mother, occupied the land and made valuable improvements thereon. The mother died after the oldest of the plaintiffs had attained his majority; defendant was thereupon appointed guardian for plaintiffs, who were then minors. After the three oldest of plaintiffs had become of age, they united in a bond obligating themselves to convey to defendant the land in controversy for the consideration of \$500 to be paid to each, for which defendant executed his promissory notes payable at a future day, without interest. The other plaintiffs, upon reaching their majority, executed a like obligation. The plaintiffs in this action sued to set aside these contracts, on the ground that their execution was procured through the fraud of defendant, and undue influence exerted by him over them.

We think the evidence before us supports the decree rendered in the Circuit Court. From their earliest childhood the plaintiffs were subject to the authority of defendant, who stood, as to them, *in loco parentis*. The evidence shows that, while he was not unkind towards plaintiffs, he exerted his authority over them with a firm hand. They were unusually obedient, and entertained the respect for him due a parent. The evidence clearly shows that the contracts were executed at his solicitation, and upon

requests that in effect, were commands. The plaintiffs, at the time of the execution of the instruments, were not of ordinary intelligence—certainly had not the acquaintance with business affairs usually possessed by persons of their age. They did not have a full knowledge of the extent of their interest in the lands. Defendant represented to one or more of plaintiffs that they were liable to lose the land, thus exciting their fears. The consideration he undertook to pay the plaintiffs for the property was less than half its value.

The record presents the case of defendants standing *in loco parentis* to all the plaintiffs, and the guardian of all but one of them, procuring the execution of the contracts after their majority, but before they were emancipated from the habit of obedience and deference to him, by the exercise of his authority, by solicitation, and, in one instance, through fear excited by false representations.

The contract, besides, is unconscionable, the consideration therefor being greatly inadequate. Contracts between persons holding towards each other relations of this character, are regarded by equity with jealousy; under its rules the rights of the weaker party will be protected, and the power and influence of the stronger, acquired by long habits of authority exercised and obedience rendered, will be restrained (1 Story's Eq., Pp. 309, 317.)

The decree of the Circuit Court, besides declaring the contract invalid, provides that plaintiffs recover \$1,790 of defendant for the rent of the land since the plaintiffs arrived at their majority. The evidence supports this provision of the decree. It ought, however, to have further provided that the notes executed by defendant, which the evidence shows plaintiffs offered to surrender, be given up to the plaintiff. A decree will be rendered in this court conforming to the decree of the court below, with the condition just suggested that the promissory notes of defendant be delivered to him before it shall be operative.

Affirmed.

Dissent of ADAMS, J., does not concur in the conclusions of the foregoing opinion, so far as it affects the contracts of two of the plaintiffs, Joseph H. and Adam H. Tucke, which, he thinks, should be held valid, for the reason that, in his opinion, they were, at the time of the execution of the instruments, of such age as to authorize the conclusion that they were emancipated from the habit of obedience to defendant.

Lender and borrower

FRANK C. DUNCAN *v.* MILTON H. BUTLER,
47 Mich. 94 (1881).

MARSTON, C. J.: No extended discussion of the facts is deemed necessary in this case. The bill was filed to foreclose a mortgage given by Duncan October 14, 1878, to complainant to secure the payment of a note for \$5000 drawing ten per cent. interest payable semi-annually. The property covered by the mortgage was all the right, title and interest of Duncan in and to any real estate, situate in Michigan or elsewhere, which he acquired as heir at law or devisee under the last will and testament of his father, William C. Duncan. Duncan appeared, answered and afterwards filed a cross-bill, setting up substantially the same facts set forth in his answer, and asking relief.

It appears that Duncan was a young man of dissolute habits, a spendthrift and of not much business experience. Although he had an income of \$100 per month from his father's estate, yet he seems to have been in want of money; he had previously borrowed from Mr. Butler, and early in October, 1878, made application for another loan. The first application was not entertained, but at a subsequent interview Butler informed him that he, Butler, owned 160 acres of land in Grand Traverse county, and

that if he, Duncan, could use that land, and would take it at \$3200, he, Butler, would make the loan, but at the same time refused to do anything further until Duncan would go see the land and thus ascertain its character and value. Directions were given Duncan how to get to the land, and with a friend named Hill, Duncan started, got as far as Grand Rapids, remained there a day or two, returned to Detroit and informed Butler they had seen the land; that it was satisfactory and that Duncan would take it. Thereupon a conveyance of this land was made to Duncan, a due bill of Duncan's which Butler held for \$47 was surrendered up; a credit of \$199 interest upon a previous mortgage held by Butler was endorsed, and \$1000 in cash was paid to Duncan. At the same time a policy of insurance upon Duncan's life was taken out and assigned to Butler, upon which the premium of \$110.35 was paid, and \$556.75 was retained by Butler to pay annual premiums on such policy thereafter as the same should become due, thus making up the sum of \$5000 for which Duncan gave his note and the mortgage in question to secure the same.

At the time of this transaction Duncan was about 25 years of age, and while there was an apparent fairness on the part of Butler, especially in requiring Duncan to examine the Grand Traverse lands, yet when we look into the entire matter we find it of so unconscionable a nature that a court of chancery could not lend its aid in enforcing it. The title to the Grand Traverse land was defective and the value thereof was but little, if any, over \$1000. Duncan knew nothing about the value of such lands, would not have known even had he examined them, and could have had no possible use for such lands except to raise money thereon, all of which facts were fully known to Butler. The security given by Duncan was ample, and why a policy of insurance should have been taken out and assigned to Butler we are at a loss to discover, and more especially the reason for Butler's retaining in his hands the full

amount of five years' annual premiums, while at the same time he had included such sums in his mortgage note and was receiving ten per cent. interest payable semi-annually thereon, although the money still remained in his own hands.

To state the transaction mildly, it was taking advantage of Duncan's weakness and anxiety, and under the guise of an apparently fair business transaction, exacting an usurious interest which a court of equity cannot sanction. In so far as the parties can be restored to their former position they should be, and the moneys received by Duncan he should pay with interest thereon as he agreed.

The decree below must be reversed, and one entered giving Duncan the right to reconvey to Butler the Grand Traverse lands; that Butler's mortgage be held good for the \$1000 paid, the amount of the due-bill, and endorsement upon the previous mortgage debt, and the premium paid upon the \$5000 insurance policy, with interest thereon from the date of each payment, conditional however that Butler reassign such policy to Duncan; and that if such sums are not paid within ninety days then that Butler proceed to sell the mortgaged premises. And the cause will be remanded to the court below to render and enforce a decree in accordance with this opinion, Duncan to recover costs of both courts.

The other Justices concurred.

Confidential relationship

KLINE v. KLINE,
57 Pa. 120 (1868).

SHARSWOOD, J.: Upon a question arising in the Orphans' Court as to the right of the widow of Gabriel Kline to any share of his estate, an issue was directed to try the

validity of an antenuptial contract between her and the intestate, dated March 21st, 1850, by which it seems to have been assumed that she had by anticipation renounced or released all her rights as widow. Whether the instrument does bear that meaning is a question which does not arise on this record, has not been argued, and upon it, we desire to be understood, there is no opinion either expressed or to be implied in the judgment we now enter. The deed was executed by the parties a very short time before their marriage, and it was alleged on behalf of the widow that the circumstances of her intended husband were concealed from her and misrepresented in the writing itself, in consequence of which she was induced for a very inadequate consideration to subscribe it. Evidence tending to show this was given. It was contended on her part, that it was incumbent on the plaintiffs in the issue to show that Gabriel Kline fully informed her of the amount and extent of the property owned by him. Had the judge contented himself with giving a simple negative to this proposition, it would perhaps have been unexceptionable. But his charge was much broader, for he instructed the jury that, "the woman was bound to exercise her judgment and take advantage of the opportunity that existed to obtain information; if she did not do so it was her own fault. The parties were dealing at arm's length. He was not bound to disclose to her the amount or value of his property." This part of the charge was excepted to and is assigned for error.

There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category with buyers and

sellers, and to say that they are dealing at arm's length, we think is a mistake. Surely when a man and woman are on the eve of marriage, and it is proposed between them, as in this instance, to enter into an antenuptial contract upon the subject of "the enjoyment and disposition of their respective estates." it is the duty of each to be frank and unreserved in the disclosure of all circumstances materially bearing on the contemplated agreement. It may perhaps be presumed in the first instance that such disclosure was made, but any designed and material concealment ought to avoid the contract at the will of the party who has been injured. Neither Judge Story nor any other elementary writer has pretended to give an exhaustive catalogue of those confidential relations which require the utmost good faith (*uberrima fides*) in all transactions between the parties: 1 Story's Eq. Sec. 215. That distinguished jurist, in commenting upon the class of cases in which secret and underhand agreements, in fraud of marital rights, have been relieved against in equity, remarks, that while they are meditated frauds on innocent parties, and upon that account properly held invalid, yet that the doctrine has "a higher foundation, in the security which it is designed to throw round the contract of marriage, by placing all parties upon the basis of good faith, mutual confidence and equality of condition." 1 Story's Eq. Sec. 267.

If, indeed, this agreement was intended to debar the wife of all future right to any share of her husband's estate, in case she survived him, it was a most unequal and unjust bargain. It holds out the idea in the recital that his only property was the house and lot he then occupied, while the jury might have inferred from the evidence that he was worth at that time ten times its value. It bestows on her a portion of the house for life, with her own household goods which she owned before marriage, and the small annuity of \$40 a year or about 11 cents a day to feed and clothe her, to find medical attendance and nursing for her

when sick, and to bury her decently when she died. If, as has happened, she should find herself a solitary widow, without children, at the advanced age of seventy, such a pittance leaves her to be an object of private charity or public relief. To say that she was bound when the contract was proposed to exercise her judgment, that she ought to have taken advantage of the opportunity that existed to obtain information, and that if she did not do so it was her own fault, is to suggest what would be revolting to all the better feelings of woman's nature. To have instituted inquiries into the property and fortune of her betrothed would have indicated that she was actuated by selfish and interested motives. She shrank back from the thought of asking a single question. She executed the paper without hesitation, and without inquiry. She believed that he would propose nothing but what was just, and she had a right to exercise that confidence. She lived with him seventeen years, for aught that appears, as an affectionate and faithful helpmate, and no doubt largely assisted in accumulating the fortune—at least of \$15,000—of which he died in possession according to the evidence. We think there was error in the charge and accordingly Judgment reversed, and venire facias de novo awarded.

DURESS

What constitutes duress

JAMES N. MORSE, *v.* ARTEMAS B. WOODWORTH,
155 Mass. 233 (1891).

KNOWLTON, J.: The only remaining exceptions relate to the requests of the defendant and the rulings of the Court in regard to duress. The plaintiff contended that he gave up the note, and signed the release under duress

by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crimes overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that

effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid the contract if such imprisonment is unlawfully used to obtain the contract. *Richardson v. Duncan*, 3 N. H. 508.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position

to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his but another's.

We are aware that there are cases which tend to support the contention of the defendant. But we are of opinion that the view of the subject heretofore taken by this Court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions on such cases, both in England and America.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he was liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

Exceptions overruled.

MARSHALL, J., IN *GALUSHA v. SHERMAN*,
81 N. W. Rep. (Wis.) 495 (1900).

It (duress) is a branch of the law that, in the process of development from the rigorous and harsh rules of the ancient common law, has been so softened by the more humane principles of the civil law and of equity, that the teachings of the older writers on the subject, standing alone, are not proper guides. The change from the ancient doctrine has been much greater in some jurisdictions than in others. There are many adjudications based on citations of authorities not in themselves harmonious, and many statements in legal opinions based on the ancient theory of duress, which together create much confusion on the subject, not only as it is treated by text writers but by judges in legal opinions.

Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant and courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself. Co. Litt. 253. * * *

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See 1 Chit. Cont. (11th ed.), p. 272. But the ancient theory that duress was a matter of law to be determined *prima facie* by the exist-

ence or non-existence of some circumstance deemed in law sufficient to deprive the alleged wronged person of freedom of will power, was adhered to generally, the standard of resisting power, however, being changed, so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb, came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. * * * Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, was the alleged injured person,

by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained.

The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly a matter of fact, though of course the means may be so oppressive as to render the result an inference of law. It is a mistaken idea that what constitutes duress is different in case of an aged person or a wife or a child than in the case of a man of ordinary firmness. As said in *Wolff v. Bluhm* (95 Wis. 257), 'the condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress. The more modern text writers so state the law to be. * * *

The true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his per-

sonal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him. * * *

An arbitrary rule, that a threatened lawful arrest and imprisonment implying harsh or unreasonable use of criminal process, and where no warrant has been issued and there is no danger of the threat being immediately carried out, is not sufficient to produce duress, seems unreasonable. Such, however, is the doctrine of the Supreme Court of Maine, and the cases supporting it will be found very generally cited by text writers and judges. That rule goes naturally with the doctrine that every person, without regard to actual mental power, is bound to come up to the standard of average men in that regard or suffer the consequences. * * *

Chapter V

LEGALITY OF OBJECT

Sunday contracts

A. COOK SONS, APPELLANT, v. J. B. FORKER,
193 Pa. 461 (1899).

MITCHELL, J.: The original statement on the promissory notes having been amended, the only form of the action with which we are concerned is for money had and received.

Certain notes of one Weston were discounted by plaintiffs on Sunday, and a check for the proceeds given by plaintiffs to defendant on the same day, but dated as of the day following. The defendant indorsed the check on the Sunday it was given, but the money was drawn on it by the indorsees on the following Wednesday. This is the money had and received which is the cause of action declared upon in the amended statement. The Court properly held that there could be no recovery on the note, but the action for the money stands on different ground. As to it the contract was not complete or executed on Sunday. Its object on the part of the defendant was to obtain the money on the discounted notes before their maturity, and it was not carried out until the money was obtained. The check in the meantime was merely a part of the incomplete Sunday agreement, and as such either party could have refused to go further with it. But when the holder presented and the plaintiff paid it both parties ratified and reaffirmed the transaction with all its consequences. This was done on a legal day, and made a legal and binding loan of the money. * * *

Contracts made on Sunday are not void in the sense that they do not admit of ratification, though so long as

they are executory the law will refuse to enforce them: *Chestnut v. Harbaugh*, 78 Pa. 473; and acts of ratification will make them new contracts which parties will be bound to perform; *Uhler v. Applegate*, 26 Pa. 140. It was accordingly held in the latter case that an agreement made on Sunday to extend the time of payment of a note, in consideration of the anticipation of part of the amount, became binding by the agreed prepayment on a legal day, Chief Justice Lewis saying, "It is not the intention of the law that its regard for the Sabbath day shall be made the means of perpetrating a fraud." So in *Whitmire v. Montgomery*, 165 Pa. 253, a note made and delivered on Sunday was held to be ratified and made good by a subsequent payment of interest on it.

Stock gambling contracts

FREELY *v.* JACOBY, APPELLANT,
220 Pa. 609 (1908).

Opinion by Mr. Justice Brown.

The defense set up by this appellant in his affidavit of defense, though most ungracious is a legal one under the settled policy of the law, and we must so declare. He is sued on his promissory note for \$4,500, given to Alexander McCoy—apparently his friend—on May 2, 1907, and payable on demand. McCoy died two days afterwards and, in resisting payment of this note, the appellant avers that it was given in settlement of the amount advanced for him by the decedent in joint gambling or wagering operations which they had carried on for a little more than a month prior to McCoy's death. The material averments in the affidavit of defense are that in March, 1907, the appellant and McCoy agreed between themselves, each with the other,

that they would engage in buying and selling stocks and other securities on what is known as "margins," and would speculate on the rise or fall of such stocks and securities above or below the price at which they bought or sold the same; that any profits made in such transaction were to be equally divided between them and all actions were to be equally divided between them and all losses incurred to be equally borne by them; that all moneys used in said transaction were to be and were advanced by McCoy for the joint account of himself and appellant; that from March 26, 1907, until the death of McCoy they had purchased and sold nearly 4,000 shares of stock on margins, all of which had been disposed of except 1,150 shares; that on May 9, 1907, the appellant and the appellee, as executor of McCoy, had the remaining 1,150 shares transferred on the books of their brokers one-half thereof to the account of the estate of Alexander McCoy and one-half to that of the defendant, the same having been dealt in under the agreement aforesaid; that at no time during the period between March 26 and May 4, 1907, had McCoy or the appellant paid the purchase money for any of the said stocks, or had any portion of the same in their possession; that it was not their intention, or the intention of either of them, at any time, to pay for the said stocks, and accept delivery of the same; that at no time had either of them any other interest in the transaction than the gain or loss which might happen upon the uncertainty of the rise or fall in the price of said stocks, and they were jointly interested only in the settlement of the differences in the purchase and sale or sale and purchase thereof.

The essence of the foregoing averments is that under an agreement between the appellant and McCoy they speculated jointly on the rise and fall of stocks through the agency of a firm of brokers; that their operations were of a gambling or wagering character, as they never had any of the stock or securities in their possession, and it was not their

intention that they should have and that the moneys given the brokers in these joint transactions were advanced by McCoy, for half of which the note in suit was given. Under these averments the plaintiff cannot now have judgment. *Fareira v. Gabell*, 89 Pa. 89, and *Waugh v. Beck*, 114 Pa. 422, are conclusive of this.

In the first of these cases we adopted the following from the charge of Judge Hare in the court below: "One who should undertake to make a bet or wager for another, and advance the money staked, would have no right of action against his principal in the event of loss." In the second we said: "As a general rule money loaned for the specific purpose that it shall be used by the borrower to do an act in violation of law, and has been so used cannot be recovered back by the lender. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction; *Wharton Cont.* 341-2-3. "Where stock-jobbing is illegal, money lent for the purpose of carrying it on cannot be recovered, supposing it was lent knowingly and with the purpose of furthering the illegal act: *Id.* 453 * * * Where a man lends money to another for the express purpose of enabling him to commit a specific unlawful act, and such act be afterwards committed by means of the aid so received, the lender is a *particeps criminis*."

The court below, on the authority of *MacDonald v. Gessler*, 208 Pa. 177, deemed the affidavit of defense insufficient because it contains no averment of an intention on the part of the brokers to engage in stock gambling with McCoy and Jacoby. If this were a suit by the brokers to recover from the appellant moneys advanced by them for carrying stocks for him, the view of the court below would undoubtedly be correct. But this is not such a controversy. According to the affidavit of defense, McCoy and

Jacoby agreed to embark in an unlawful enterprise; that in pursuance of such agreement they did so embark under a further agreement that the funds needed should be paid, in the first instance, by one of them; that the one who so agreed to advance the money did advance them in the unlawful enterprise, and the claim of his personal representative is for one-half of what was so advanced. For the present the brokers are not in the case. They may get into it on trial if it should become necessary for the plaintiff to show that the appellant's note does not bear the taint he himself would put upon it to avoid paying what in honor and good faith he ought to pay.

Judgment reversed and a procedendo awarded.

Interference with the administration of the law

LINDSAY v. SMITH AND HOSKINS,
78 N. C. 328 (1878).

BYNUM, J.: This is an action for a breach of covenant. The defendants demur to the complaint, and the facts are these: On February 17th, 1874, an indictment was pending in the Superior Court of Guilford County, against the plaintiff, Lindsay, for erecting and maintaining a public nuisance, by constructing a dam across a certain creek, and ponding back the water thereof, which thereby became stagnant, foetid, and unwholesome, to the common nuisance of the citizens. That on said February 17th the covenant sued on was entered into, whereby the defendants covenanted under the penalty sued for, to cut, maintain and keep in repair a certain ditch through the lands of the plaintiff; and that the plaintiff covenanted that when the work was done he would pay the defendants \$50; and it was further covenanted as follows: "And it is further

agreed by all the parties hereto, in consideration of the premises, that the indictment now pending in the Superior Court of Guilford County, against the said Alexander H. Lindsay, found at February Term, 1873, shall be discontinued and not proceed, and the prosecution thereof stopped without cost to the said Lindsay." * * * "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." And this covenant is signed by the plaintiff and defendants.

Assuming this covenant to have been broken by the defendants, do these facts constitute a cause of action?

But the defendants' counsel contends with great ingenuity that there are two covenants in this sealed instrument, and that they are divisible, part being good, and part bad; that the contract of the defendants is to do two things; first, to dismiss the indictment, which is illegal and void, but second, to cut and keep up the ditch, which is legal and valid, and is the contract for the breach of which the action is brought. In regard to this proposition the general rule is that if there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails, under the maxim "*utile per inutile non vitiatur*." But where there is but one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void, as where one sum is to be paid for the doing of a legal and illegal act. Thus, where upon a contract for the hiring and service of a housekeeper at certain agreed wages it appears to have been a part of the contract that the housekeeper should cohabit with her master, the whole will be void and the wages irrecoverable by her. *Rex v. Northingfield*, 1 B. and Ad. 912. In *Alexander v. Owen*, 1 T. R. 227, the case was this: Upon a

contract of sale of tobacco, it was agreed that counterfeit money should be taken in payment, and the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it and brought an action to recover the price of the tobacco, but the Court said that the sale could not be held to be good and the payment bad; if it was an illegal contract, it was equally bad for the whole, and the parties being in *pari delicto*, *melior est conditio defendentis*. Apply these principles to our case. There was but one indivisible consideration moving from the plaintiff, to wit, the sum of \$50, and for that consideration, the defendants covenant to do two things—the one legal and the other illegal. The consideration cannot be divided and enough of it assigned to support the contract to cut and maintain the ditch, but it, as it were, *per my et per tout*, enters into and supports both promises.

But there is another view equally fatal to this action. A part of the covenant is in these words: "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." So the validity of the contract is expressly made to depend upon the performance of the very act which makes it invalid, to wit, the dismissal of the indictment. The covenants were not to be binding until the prosecution had been discontinued, and the contract to dismiss it was immoral and void. In such cases the law will leave the parties where it finds them.

No error.

Per Curiam. Judgment affirmed.

Restraint of trade

COTTINGTON, APPELLANT, v. SWAN,
RESPONDENT,
128 Wis. 321 (1906).

SIEBECKER, J.: The only ground of objection urged to the complaint is that the contract upon which recovery is claimed by the plaintiff is in restraint of trade and the courts therefore will not enforce it nor consider the question of injury resulting from its breach. Contracts in restraint of trade have been repeatedly considered by this court and held to be void as against public policy, "unless limited, as to time, space, and extent of trade, to what is reasonable under the circumstances of the case, because they tend to deprive the public of the services of the persons in those capacities in which they are most useful, and also tend to expose the public to the evils of monopoly." *Tecktonius v. Scott*, 110 Wis. 441. Condemnation of contracts of this nature has been quite universal by the courts, upon the ground that no person should be permitted to so contract as to preclude himself from following a lawful occupation for the benefit of himself and of those dependent upon him, or to deprive the public of his industry. The vital question in the consideration of every such contract is whether the restraint imposed is reasonable under the circumstances with reference to "the situation, business, and objects of the parties," and if "the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid." *Hubbard v. Miller*, 27 Mich. 15. In the following cases in this court involving contracts of this kind the determination rested upon these grounds, and if the restriction was found reasonable and just the contracts were sustained as valid; if they unreasonably restricted the parties so as to restrain

them from pursuing their occupations or deprived the public of their industry they were held invalid. *Kellog v. Larkin*, 3 Pin. 123.

Under the contract in question defendant sold his livery business and its good will to plaintiff and Ackley for a valuable consideration and agreed not to engage in that business directly or indirectly in the village of Bloomer while the purchasers or either of them "or their heirs, executors or administrators (should) be engaged in such business within said village." It is apparent that the restraint contracted for was a material consideration in inducing plaintiff and his associate to make this purchase from the defendant for the purpose of conducting a livery business in this village, and, under the circumstances, it seems reasonable to assume that defendant could not have secured the consideration obtained for such sale but for the covenant not to engage in such a business in the village of Bloomer. That these considerations must have entered into the making of this contract is apparent from its terms. Are its terms unreasonably restrictive, and is the public thereby deprived of defendant's industry? Manifestly he is not precluded from pursuing this business anywhere outside of this village, and he may engage in any other business within or outside of the village. Under its terms the village may have this very business continued within its limits, for the agreement is that he shall not engage in it so long as it is conducted and carried on by the purchasers or their personal representatives or heirs. If they cease to conduct this business at any time, immediate or remote, then defendant may conduct it without restraint. The claim that such restraint would tend to subject the public of this village to a monopoly in this business as conducted by plaintiff is rather a remote speculation, for this field of enterprise for conducting such a business and competing with plaintiff for the public patronage is open to the whole world. Viewing the restrictive provision of this contract as applied to the situation of the

parties it is manifest that it was made for the honest purpose of affording a reasonable and fair protection to the interests of the plaintiff in whose favor it was made, and that it was a reasonable one as between them. Under these circumstances and conditions we do not find that the restriction imposed is unreasonable in its operation and likely to cause injury to the public, nor is it an unreasonable restraint upon defendant in the pursuit of his occupation. This makes it a valid contract and entitles plaintiff to relief if defendant has breached it and caused him injury.

BY THE COURT. The order appealed from is reversed, and the cause remanded with directions to enter an order overruling the demurrer and for further proceedings according to law.

DIAMOND MATCH CO. *v.* ROEBER,,

106 N. Y. 473 (1887).

ANDREWS, J.: Two questions are presented: *First*. Whether the covenant of the defendant contained in the bill of sale executed by him to the Swift and Courtney and Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly, engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employe of said The Swift and Courtney and Beecher Company), within any of the several States of the United States of America, or in the Territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the Territory of Montana," is void as being a covenant in restraint of trade; and, *second*, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant. * * *

The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves* (7 Bing. 735) Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If," said Sir George Jessel, in *Printing Company v. Sampson*, L. R. 19 Eq. Cas. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the

utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice." * * *

The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial.

Chapter VI

SPECIAL FORMALITY

NELSON *v.* BOYNTON,
44 Mass. 396 (1841).

Assumpsit, to recover the amount of two promissory notes dated April 1, 1828, each for \$20, one payable in six months and the other in twelve months from date, with interest, after given by the father of the defendant to the plaintiff. In the course of the trial evidence was given that the plaintiff commenced suit against the father of the defendant on the notes and attached his real estate; that the present defendant, while said estate was so under attachment orally promised the plaintiff to pay the amount of the notes if the plaintiff would discontinue his suit; and that the plaintiff discontinued the same accordingly. The judge instructed the jury that "this bargain, if they believe it to have been made, was an original undertaking by the defendant, for new consideration, and was not within the statutes of frauds." A verdict was returned for the plaintiff, and the defendant alleged exceptions to the ruling of the court.

SHAW, C. J.: Questions depending upon this branch of the statute of frauds are often attended with some perplexity, on account of the difference in laying down a general rule, by which to distinguish a guarantee, a mere collateral promise for the debt of another, from the original agreement, upon a new and independent construction, when the subject of the contract is the debt or default of another.

Our own statute is in terms so nearly like the statute 22 Car. 11 to prevent frauds and perjuries, that the English authorities upon its construction are entitled to the

same consideration as upon questions of common law. The statute, in force when the promise in question was alleged to have been made, was this: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or misdoings of another person, unless an agreement, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." St. 1788, C. 16, Sec. 1. * * *

Some things under the statute seem to be well settled; and one is that to bind one person for the debt or default of another, there must not only be a promise or memorandum in writing, but such a promise must be made on good consideration. The statute does not vary the rule of common law, as to what consists a valid and binding promise; to every such promise, whether oral or written there must be a good consideration. A promise without consideration is bad by the common law, as *nudum pactum*; a promise on good consideration, without writing, if for the debt of another, is bad by the statute. To bind one therefor for the debt or default of another, both must concur; first, a promise on good consideration, and secondly, evidence thereof in writing. It is not enough therefore that a sufficient legal consideration for a promise is proved, if the object of the promise is the payment of the debt of another, for his account, and not with a view to any benefit to the promisor. * * *

In case one says to another, "deliver goods to A, and I will pay you," it is binding, though by parol, because A, though he receives the goods, is never liable to pay for them. But if, in this same case, he says, "I will see you paid," or, "I will pay, if he does not," or uses words equivalent, showing that the debt is in the first instant the debt of A, the undertaking is collateral and not valid, unless in writing. *Matson v. Warham*, 2 T. R. 80. * * * In these cases the same consideration, which is the consider-

ation of the promise of the principal is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal, as the collateral promise of the surety, and is a good consideration for both. * * * The statute of frauds, says Mr. Justice Bayley, in *Edwards v. Kelly*, 6 M. & S. 209, was aimed at cases where a debt being due from one person, another engaged to pay it for him; but where one promised to pay the debt of another in order to release property in which he or his employers had an interest—to extricate property subject to distress, on promising to pay the amount due it was neither within the letter, or the mischief of the act. [After citing numerous cases the Court continued.]

The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute, when the party promising has for his object which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearances of benefit to him, it is within the statute. In the case of *Fish v. Hutchinson*, 2 Wils. 94, the plaintiff had sued a third person, and the defendant, in consideration that he would stay his action, promised to pay; the original debt still subsisting. It was held that it was promise for the debt of another and within the statute. So in *Jackson v. Rayner*, 12 John's 291, where the plaintiff had sued the defendant's son, although the defendant stated, at the same time that he had taken the son's property, and meant to pay his debts, it was held not binding without a promise in writing. * * *

Under the circumstances the court are of opinion that the promise was within the statute of frauds; a promise to pay the debt of the father; and therefore, though made on good consideration, was not valid, without a promise or memorandum of the agreement in writing. For although

the effect of the discontinuance of the action was to discharge the attachment, yet that was incidental only, and the leading object and purpose were the relief and benefit of the father, and not of the son. It does not appear that the son had any interest in the estate released, or object or purpose of his own to subserve. It is the ordinary case of a son becoming surety for the father's debt, in consideration of surceasing a suit or other forbearance, and therefore, not being in writing, is within the statute. And, although the forbearance would be a good consideration for such a promise, they proved to be written evidence, yet the consideration was not of such a character as to constitute a new and original transaction between these parties.

The court below having expressed a different opinion, and instructed the jury that this bargain, if they found it had been so made, was an original undertaking by the defendant, for a new consideration, and was not therefore within the statute of frauds, and also that, notwithstanding the notes were not given up, nor the father discharged, still the court decided, if there was a consideration for the promise, that the promise need not be in writing; this court are of the opinion, that the verdict rendered for the plaintiff, in pursuance of these instructions must be set aside, and a new trial granted.

Verdict set aside and a new trial granted.

PART II

OPERATION OF CONTRACT

Chapter VII

PRIVITY OF CONTRACT

Privity—Lacking

BOSTON ICE CO. v. POTTER,
123 Mass. 28 (1877).

Contract on an account annexed for ice sold and delivered.

The judge found that the plaintiff could not maintain this action. Plaintiff alleged exceptions.

ENDICOTT, J.: To entitle the plaintiff to recover it must show some contract with the defendant. There was no express contract and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supplying, he terminated his contract, and made a contract for his supply with the Citizens Ice Company. Plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens Ice Company, until after the delivery and consumption of ice. The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied *assumpsit*. *Hill v. Snell*, 104 Mass. 173. * * * No presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he had received it under the contract made with the Citizens Ice Co. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reason for so doing cannot be inquired into. If the defendant, before receiving the ice or during its delivery, had received notice of the change, and that the Citizens Ice Company could no longer perform its contract with him, it would then have been an undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt v. Nelson*, 1 Gray 536. * * * If he had received notice and continued to take the ice as delivered a contract would be implied. *Mudge v. Oliver*, 1 Allen 74.

There are two English cases very similar to the case at bar. In *Schmaling v. Thomlinson*, 60 Tunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the

defendant, and it was held that he could not recover compensation for his services from the defendants. The case of *Bolton v. Jones*, 2 H. and N. 564, was cited by both parties to the argument. There the defendant, who had been in the habit of dealing with one Brockelhurst, sent a written order to him for goods. The plaintiff, who had on the same day, bought out the business of Brockelhurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brockelhurst, and it was held that the plaintiff did not maintain an action for the price of goods against the defendant.

* * *

The implied *assumpsit* arises upon the dealings between the parties of the action and cannot arise from the dealings between the defendant and the original contractor to which the plaintiff was not a party.

Exceptions overruled.

SARAH MELLEN, ADMINISTRATRIX *v.* SHILO-
METH S. WHIPPLE,

1 Gray (Mass.) 317 (1854).

Action of contract, brought by the administratrix of Michael Mellen, on December 20th, 1851. The declaration avers that "the defendant is indebted to the plaintiff for the following cause of action: On June 1st, 1844, one John M. Rollins, for a good and sufficient consideration, made and delivered to Charles Ellis and John M. Mayo (then partners under the firm of Ellis & Mayo), his note for the sum of \$500, payable to said Ellis & Mayo or order in three years from date, with interest thereon at the rate of 6 per cent. per annum, payable semi-annually; and also made to said payees, to hold to themselves, their heirs and assigns, as security for the payment of said note, a mortgage deed of the same date, of a certain lot of land situated

at the corner of Curve Street and Harrison Avenue, in Boston, and more particularly described in said deeds. Said John M. Rollins afterward, to wit, on April 8th, 1845, by his deed of that date, conveyed the equity of redemption of said estate to Shilometh S. Whipple, the defendant; and said deed contained the following clause: "The said granted premises are subject to a mortgage for \$500 with interest; said interest payable semi-annually; which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." Said Whipple accepted said deed, entered upon the said estate, and paid the interest on said note to the said mortgagees and their assigns to June 1st, 1848; and said Michael Mellen, the plaintiff's intestate, in his lifetime became, by regular assignment, transfer, endorsement and delivery, for valuable consideration, possessed of said mortgage and the note for \$500 secured thereby; and said Whipple became by law indebted to said intestate in the amount of said note; and said Michael Mellen is since deceased, and the plaintiff was duly appointed administratrix of his estate; and the said Whipple is now justly indebted to the plaintiff for the amount of said note of \$500 and interest thereon from June 1st, 1848; and promised the plaintiff to pay the same; yet, though often requested has not paid the same." To this declaration the defendant demurs, "and alleges and assigns for cause of this demurrer, that the declaration does not sufficiently set forth any legal cause of action."

METCALF, J.: * * * The general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes thus expressed. There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the plaintiff on the contract. *Crow v. Rogers*, 1 Stra. 592.

Indebitatus assumpsit. for money had and received can be maintained, in various instances, where there is no actual privity of contract between the plaintiff and defendant, and where the consideration does not move from the plaintiff. In some actions of this kind a recovery has been had, where the promise was to a third person for the benefit of the plaintiff; such action being an equitable one that can be supported by showing that the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff, without showing a direct consideration moving from him, or a privity of contract between him and the defendant.

Most of the cases in this first class are those in which A. has put money or property into B.'s hands as a fund from which A.'s creditors are to be paid, and B. has promised, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it was delivered to him, to pay such creditors. In such cases the creditors have maintained actions against the holder of the fund. *Disborn v. Denaby*, 1 D'Anv. Ab. 64. On close examination the case of *Carnegie and Another v. Morrison and Another*, 2 Met. 381, will be found to belong to the same class. The Chief Justice there said: "Bradford was indebted to the plaintiffs, and was desirous of paying them. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking he forbore to adopt other measures to pay the plaintiffs' debt."

By the recent English decisions, however, one to whom money is transmitted, to be paid to a third person, is not liable to an action by that person, unless he has agreed to hold it for him. And such was the opinion of Spencer, J., in *Weston v. Barker*, 12 Johns 282.

Cases where promises have been made to a father or uncle, for the benefit of a child or nephew, form a second class, in which the person for whose benefit the promise

was made has maintained an action for the breach of it. The nearness of the relation between the promisee and him for whose benefit the promise was made, has been sometimes assigned as a reason for these decisions. And though different opinions, both as to the correctness of the decisions, and as to this reason for them, have often been expressed by English judges, yet the decisions themselves have never been overruled, but are still regarded as settled law. *Dutton v. Pool*, 1 Vent 318, is a familiarly known case of this kind, in which the defendant promised a father, who was about to fell timber for the purpose of raising a portion for his daughter, that if he would forbear to fell it the defendant would pay the daughter £1000. The daughter maintained an action on this promise. Several like decisions had been previously made. * * *

The defendant has no money which in equity and good conscience belongs to the plaintiff. No funds of Rollins', either in money, property or credit, have been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins. The sale of the equity of redemption to the defendant did not lessen the plaintiff's security for the mortgage debt which Rollins owed her intestate, for that equity could not have been taken toward payment of that debt. *Atkins v. Sawyer*, 1 Pick. 351. There was no nearness of relation between Rollins and the plaintiff's intestate. Nor has the defendant had the use and occupation of the land of the plaintiff or of her intestate under a promise or under any legal liability to pay rent for it. * * *

There was no privity of contract between the plaintiff's intestate and the defendant, nor did the consideration of the defendant's promise move from her intestate. Rollins sold only an equity of redemption to the defendant, leaving the estate in fee in the mortgagee. The stipulation in the deed of the equity, that the defendant should pay the mortgage notes, was a matter exclusively between the two parties to that deed, and is nothing more than the law would require of the defendant in order that he might derive any benefit from his purchase of the equity. The plaintiff still has the estate and also Rollins' personal responsibility to secure the mortgage debt.

Chapter VIII

ASSIGNMENT

Assignment of rights and duties

SAMUEL GALEY, FOR USE OF A. G. AND J. H. SMITH, CO-PARTNERS, TRADING AS SMITH BROTHERS v. W. L. MELLON, APPELLANT,
172 Penna. 443 (1896).

Assumpsit on a contract for drilling an oil well.

At the trial it appeared that on April 1, 1893, W. L. Mellon, of Pittsburg, contracted in writing with Samuel Galey to drill a well for oil or gas on a farm in Washington county. By the terms of the contract Galey was to furnish all tool, cables, etc., at his own expense and risk, and the fuel, labor and hauling required in completing the well, and case it dry of water. Mellon was to furnish wood, rig, casing, machinery and water, and pay 90 cents per foot for the drilling. On the same day the contract was made, Galey, in consideration of \$180, made a parol assignment thereof to Smith Bros., the appellees, and Smith Bros., who were experienced contractors and drillers, did the work under the contract. Smith Bros. were not sub-contractors. Defendant claimed that one of the wells drilled was defective, owing to the neglect or incapacity of Smith Bros.' superintendent, and that Galey had no right to assign the contract to Smith Bros.

Defendant's points were as follows:

1. That there is no privity of contract in this case between the use plaintiffs and the defendant arising out of any assignment, legal or equitable, of the contract made by Galey with Mellon, and the use plaintiffs are not entitled to recov-

er upon said contract, and the verdict of the jury must be for the defendant. *Answer*: Refused. (1.) * * *

4. That the contract made by Mellon with Galey was for the personal services of Galey in the drilling of McCarty No. 3, and were not assignable, and the fact that the use plaintiffs in this case drilled the said well under an arrangement made by them with Galey gives them no right of action upon the Galey contract against Mellon. *Answer*: Refused. (4.)

FELL, J.: This action is founded upon a contract for drilling an oil well. The personal performance of the work by the legal plaintiff could not have been contemplated by the parties at the time the contract was made. The work of necessity required the labor and attention of a number of men, and it does not appear that because of his knowledge, experience or pecuniary ability, or for any other reason, Galey was especially fitted to carry it on. There is nothing of a personal nature about it, and its personal performance by him was not the inducement nor of the essence of the contract. The contract was assigned to Smith Bros., the use plaintiffs, and the work under it was done by them with the knowledge of the defendants from the beginning. The jury found that they were not sub-contractors suing upon a contract as to which they had no rights. It was competent for Galey to assign to them the executory contract with all of his rights under it, or after the completion of the work to assign to them the right to receive the amount due on settlement. In either event they had the right to use his name as legal plaintiff, but in neither would their rights rise higher than his. The action was tried on the right of the legal plaintiff to recover, the doors were opened to every defense available against him, and in no aspect of the case was the defendant prejudiced because of the form of the action.

Practically the question at the trial was whether the legal plaintiff was entitled to recover on the contract, and

that depended upon whether the fault which ultimately resulted in the destruction of one of the wells was chargeable to the defendant's field superintendent. The jury found that it was, and they had the aid of a charge by the learned trial judge which fully and clearly explains the facts and the law applicable to them.

The judgment is affirmed.

Editor's Note—A liability may be assigned with the consent of the party entitled, but this is in effect the rescission, by agreement, of one contract and the substitution of a new one in which the same acts are to be performed by different parties.

Or again, if A undertakes to do work for X which needs no special skill, and it does not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person. But A does not cease to be liable if the work is ill done, nor can any one but A sue for payment. *Devlin v. Mayor*, 63 N. Y. 8.

Assignment of proceeds

JAMES v. CITY OF NEWTON & ANOTHER, 142 Mass. 366 (1886).

This was a bill in equity against the City of Newton and Royal Gilkey, assignee of \$600 which had been assigned to the plaintiff by one Stewart out of money received as guaranteed by the City of Newton for the proper performance of the contract by Stewart to build a school house. The City of Newton in its answer admitted that it had in its hands \$600 due on account of this contract and stated that it was willing to pay said balance to such person or persons as should be justly entitled to receive the same. The defendant Gilkey in his answer claimed that the assignment was invalid.

FIELD, J.: The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due and payable to me" from the City of Newton, under and by virtue of a contract for

building a grammar school house, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of \$600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto*, unless it is accepted by the person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the City of Newton has not promised him that it will pay him \$600. The \$600 is expressly made payable "out of money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum, and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but for a long time they have recognized and enforced assignments if the whole of the debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. * * *

It is said, that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that as between assignor and assignee, there may be such an assignment. The law that, if the

debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid the different defendants according to their rights as between themselves; and the rule against partial assignments was established for the benefit of the debtor. *Public Schools v. Heath*, 2 McCarter 22.

In many jurisdictions, courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts in equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that this is no defense to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule,

he cannot, if he have notice or knowledge of an assignment of any part of it. * * *

It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against a trustee process, or against an assignee in insolvency. *Taylor v. Lynch*, 5 Gray, 49.

In *Bourne v. Cabot*, 3 Met. 305, the court said: "The order of Litchfield on the defendant was a good assignment of the fund, *pro tanto*, to the plaintiff, and the express promise to the assignee, to pay him the balance when the vessel should be sold, constituted a legal contract."

It is also settled that an equitable assignment of the whole fund in the hands of the trustee is good against a trustee process, although the trustee has received no notice of the assignment until after the trustee process is served, and has never assented to it. *Wakefield v. Martin*, 3 Mass. 558.

In *Macomber v. Doane*, 2 Allen 541, the court said: "An order constitutes a good form of assignment, it being for the whole sum due or becoming due to the drawer, and it needs not be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to \$37.50, but it was given as security for groceries furnished and to be furnished; and, on the day of the service of the writ, the defendant owed the plaintiff for groceries \$28.79, and the remaining \$8.71 was held by the trustee process. * * *

Welch & Mandeville, 1 Wheat. 233, was an action of covenant broken, brought by Prior in the name of Welch against Mandeville, who set up a release by Welch, to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The court consider the effect of certain bills of exchange, and say, "But where the order is drawn either on a general or a particular fund,

for a part only it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft;" that "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor;" and that "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit." * * *

In *Peugh v. Porter*, 112 U. S. 737, the court ordered that a decree be entered that Peugh, subject to certain rights in the estate at Winder, was entitled to one-fourth of a fund, by virtue of an assignment of one-fourth of the claim against Mexico, made before the establishment of the claim, from which the fund was derived, and before the fund was in existence, and declare the law to be that, "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it." In *Robinson v. Bacon*, 3 Greenl. 346, the order was for the payment of the whole of a particular fund and was held good. * * *

We think that there should be a decree that the City of Newton pay to the plaintiff \$600, and that the remainder of the same due from the city, after deducting its cost, be paid to Gilkey, assignee.

So ordered.

PART III

INTERPRETATION OF CONTRACTS

Chapter IX

GENERAL RULES OF CONSTRUCTION

WILLIAM SUMMERS ET AL. v. HIBBARD, SPENCER, BARTLETT & CO.

153 Ill. 102 (1894).

Several letters concerning the purchase and sale of certain iron and iron products passed between the defendant and plaintiff. The last letters of each are as follows:

"Summers Bros. & Co., Struthers, Ohio:

"Gentlemen—Your favor 4th is at hand. If you are willing to revise your ideas a little we can trade with you. You may enter our order for 5000 bdl. first-class com. sheet-iron, as follows: 500 bdl. March delivery; 500 bdl., April delivery; 1000 bdl., May delivery; 1000 bdl., June delivery; 1000 bdl. July delivery; 1000 bdl., August delivery. Prices to be: Nos. 22 and 24, \$2.60; 25 and 26, \$2.70; 27, \$2.80. Chicago delivery, 60 days, or two per cent. cash in ten days.

"If you accept our offer you may enter us for March shipment 250 bdl., 26, 24x101 in., and 250 bdl., 27, 24x101 in.

"Awaiting your prompt reply, we are, very truly yours,

"HIBBARD, SPENCER, BARTLETT & CO."

On March 11 appellants mailed to appellees an acceptance of their offer, as follows:

"All sales subject to strikes and accidents.

"Summers Bros. & Co., Manufacturers of Box-Annealed Common and Refined Sheet-Iron.

"Struthers, Ohio, March 11, 1889.

"To Hibbard, Spencer, B. & Co., Chicago:

"Mr. Charles: Dear Sir—Your favor of March 9 at hand. We accept your offer, 5000 bdl. iron, 500 March, 500 April, 1000 May,

1000 June, 1000 July, 1000 August. Prices, No. 27 at \$2.80; 26 at \$2.70; 24 at \$2.60. f. o. b. cars Chicago, 2 per cent. ten days from date of invoice. We also enter your order, 250 bdls., 26x101, and 250 bdls., 27x101. Mch. shipment.

"Respectfully yours,
"SUMMERS BROS. & CO."

In the latter part of March and early part of April, 1889, there was further correspondence between the parties, which resulted in an addition to the original contract of 3000 bundles of like sheet-iron, at same figures, for July, August and September delivery.

Appellants delivered only 1847 bundles of sheet-iron under the first or original contract. They made no deliveries whatever under the second or additional contract. As an excuse for not making further deliveries, they, on July 24, 1889, represented to appellees that the contracts were made "subject to strikes and accidents," and that they were prevented from filling the contracts in time by reason of breakages in their mills—and they still make, on this appeal, the same claims.

There was a deficit in the May delivery of 727 bundles, in the June delivery of 639 bundles, and in the July delivery of 787 bundles. July 20 was the date of the last delivery. Appellees bought on the market, of other parties, on August 3, 1889, 1000 bundles, on August 6, 1889, 2000 bundles, on August 19, 1500 bundles, and on August 24, 1000 bundles. These purchases were made in order to get iron to take the place of that which appellants had contracted to sell them. During the whole of September and into October the market price of sheet-iron kept up, being at no time lower than the prices paid in the latter part of August. The total of the sheet-iron delivered by appellants, added to that bought by appellees, was 700 bundles less than the amount that the appellants had contracted to deliver.

This suit was brought by appellees to recover from appellants the amount that they paid for the sheet-iron in excess of the contract price. They made no claim in respect

to the 700 bundles. The amount of the excess, less deductions for unpaid shipments, was \$1546.61. The court instructed the jury to find in favor of appellees for that amount. From the final judgment rendered in the trial court there was an appeal to the Appellate Court where that judgment was affirmed. The present appeal is from such judgment of affirmance.

BAKER, J.: It is insisted by appellants that the words "All sales subject to strikes and accidents" printed at the top of their letter-heads, must be considered in determining what the contract was, and that said words constituted an express condition that became a part of the contract between them and appellees. We do not so understand the case. Under date of March 1, 1889, appellees invited appellants to make them an offer of sale of a specified quantity of sheet-iron, to be delivered in certain designated months. On March 4 appellants made them an offer, as requested. On March 9, in their letter of that date, appellees declined to accept the offer received, and at the same time they submitted for consideration an offer of their own,—an offer of purchase. This offer contained all the elements and terms of a precise and complete contract, and lacked only the assent thereto of the persons to whom it was addressed to make it such a contract. The offer was to buy a certain quantity of sheet-iron, of certain sizes, to be delivered in Chicago in specified quantities and at designated times, and to pay therefor certain prices at certain stated times, and appellees concluded their proposal by saying, "If you accept our offer you may enter us for March shipment 250 bundles," etc. This offer was absolute and positive, and without any conditions, qualifications, or exceptions whatever. On March 11, appellants wrote to appellees: "Your favor of March 9 at hand. We accept your offer." And they thereupon proceeded to restate in their letter the terms of the proposal made to them. These two letters made the contract between the parties. The two preceding letters seem to us to be wholly immaterial. The mere fact that

appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words "All sales subject to strikes and accidents," no more made those words a part of the contract than they made the other words there printed, "Summers Bros. & Co., Manufacturers of Box-Annealed Common and Refined Sheet-Iron," a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an unconditional contract of sale.

In *American Express Co. v. Pinckney*, 29 Ill. 392, this court said, "In a case where the agreement is partly written and in part printed, the preference is always given to the written part." In that case the printed matter was in the body of the instrument, incorporated and mingled with the written matter. It would seem there is more reason and occasion for applying the principle of law there invoked in a case where, as here, the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written.

When an instrument is in part written and in part printed, and these parts are apparently inconsistent, or there is a reasonable doubt upon the sense and meaning of the whole, the words in writing will control, because they are the immediate language and terms selected by the parties themselves for the expression of their meaning. (*Alsagu v. St. Katherine's Dock Co.*, 14 M. & W. 796). In the case at bar it is inconsistent that the contract should be both an absolute contract and a conditional contract. The terms of payment in this contract were sixty days' time or two per cent. discount for cash in ten days. Suppose the words, "All sales not paid for on delivery to draw interest," had been printed on the letter-head; can there be any doubt that the written terms would have controlled the printed words?

Here there was a written provision that the iron was to be delivered free on board the cars at Chicago. Suppose it had been printed on the letter-head that the manufacturers would not be responsible for iron after a delivery to a common carrier; would not the written provision have governed the contract?

Upon the whole, we are inclined to the opinion that the mere fact that the words in question were printed in the caption of the paper on which appellants wrote their unqualified acceptance of the contract proposed by appellees did not have the effect of reading them into the agreement thereby consummated; and appellants understood that some sort of an agreement was brought to a completion by their act, for in their letter they wrote: "We also enter your order for 250 bundles, etc., March shipment."

Appellants made a further claim that there was an implied condition in the contract, that would relieve them from performance if their mill plant, without any fault on their part, was so disabled as to make it impossible for them to make the iron that they contracted to deliver. The contract did not call for iron manufactured at their mill. It simply called for first-class common sheet-iron of certain specified sizes. There was nothing to prevent their filling the contract by going into the market and buying sheet-iron manufactured at other mills. Appellees seem to have experienced no difficulty, other than that of being forced to pay a higher price, when they went on the market and bought from other parties the sheet-iron contracted for, which appellants failed to supply. But even if the contract had been for sheet-iron of their own manufacture, the breakages in this mill would not have relieved them from liability. The general doctrine is, that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages. (*Steele v. Buck*, 61 Ill. 343). Inevitable accident affords them no relief, for they are regarded as insurers to the extent of making good

the loss. There is a principal of the law that, in contracts in which the performance depends on the continued existence of a given or specified person or animal or thing, a condition is implied that the impossibility of performance arising from the perishing of the person, animal or thing shall excuse the performance. But there is no place in this case for the application of that rule.

There is no doubt of the correctness of the rule stated by appellants, that where delivery is required to be made by installments, the measure of damages will be estimated by the value at the time each delivery should be made. In the case at bar, appellees made threats to buy in at seller's expense, but excuses rendered and promises made by appellants of frequent and large shipments deterred them from doing so. If delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement, and where the time of delivery is postponed indefinitely, the measure of damages is the difference between the contract price and the market value at a reasonable time after demanding performance. Appellees admit that they had no legal right to buy in during the month of August, more than 3159 bundles of sheet-iron, that being the quantity then due, under the original and additional contracts, on August 1. But the uncontroverted evidence is, that the price of such iron remained firm during September and a part of October, being at no time lower than August prices. So the premature purchases worked appellants no injury, but were to their benefit. Besides this, it was held in *Follansbee v. Adams*, 86 Ill. 13, that the vendee may charge the vendor with the difference in prices without making any purchases the result being the same, and the vendee being entitled to the benefit of his contract. * * *

The making of the written contracts being admitted at the trial, the court having construed them and held that the

printed line in the caption of the letters was no part of such contracts, and having resolved, as matter of law, that there was no implied condition in them, growing out of their nature, the claimed deficit in deliveries not being denied, and there being no conflict of testimony in respect to the state of facts upon which the damages were to be based, there remained in the case no question that required submission to the decision of the jury, and it was not manifest error to direct a verdict for the plaintiffs, and instruct the jury at what amount to assess the damages. * * *

The judgment of the Appellate Court is affirmed.

Editor's Note.—A printed bill head or letter head cannot be allowed to control, modify or alter the terms of a contract which is clearly expressed in writing below it. *Sturn v. Boker*, 150 U. S. 312.

But when there is no such conflict, the provisions not being inconsistent, the written provisions will not supersede the printed ones. *Michaelis v. Wolf*, 136 Ill. 68.

VARNUM & ASPINWALL *v.* THRUSTON,
17 Md. 470 (1861).

On this appeal the only question open for argument is the construction of the agreement of the 24th of January, 1853, for though the complainant, in addition to one-twentieth of the whole capital stock, asked that Varnum & Aspinwall should be required to supply a working capital of \$200,000, this was refused, as also the account for lost profits, if, therefore, the judge below was not in error in the construction put by him on this agreement, there is no ground of just complaint by Varnum & Aspinwall against the decree, and now in relation to the true construction of this agreement, we respectfully maintain the following propositions:

1st. The agreement must be constructed agreeably to the intention of the parties, existing at the time it was made. It must not be construed by any subsequent event nor by

the result; and such intention must be the concurrent intention of both the contracting parties. Every word "agreement" (*aggregatio mentium*) imparts the assent of the minds of both parties to the same thing in the same sense, and *as between the parties and the agreement* the intention must be gathered from the agreement itself. This is an established rule of construction in all courts; equity may, and often does, control the *effect* and *operations* of an agreement; but this must not be confounded with its construction. Parson's Merc. Law 14.

2nd. And where the language of an agreement is plain and unambiguous, or by just construction manifests the clear intention of the parties, there can be no implication of an inconsistent intention. 2 Gill 74, *Benson v. Boteler*.

3rd. It is an established canon of construction that, in construing a written instrument the court should give meaning and operation to every clause and word, provided it can be done consistently with the intention of the parties, and to that end may look to the motives that led to the agreement, and to the object intended to be effected; and may also look to the surrounding circumstances and to the circumstance of the parties; and may suppose new and different aspects of the case from those which have actually arisen, in order to ascertain whether a suggested interpretation does or does not comport with the intention of the parties. 1 G. & J. 150, *Wirgman v. Mactier*.

4th. And it is also an established rule that, in the construction of a written paper of doubtful import or which is reasonably susceptible of two inconsistent interpretations, in relation to the right of one not a party to the agreement, that construction shall be adopted which is most beneficial to such third person.

TUCK, J.: The rules of interpretation asserted on the part of the appellee, cannot be questioned; but they are all subordinate to the leading principle, that the intention of the parties, to be collected from the under instrument must

prevail, unless inconsistent with some rule of law. And the maxim, that the words of a writing shall be taken most strongly against the part employing them, "applies to cases of ambiguity in the words, or where the exposition is requisite to give them lawful effect. It is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail.

"The modern and more reasonable practice is, to give to the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction." 2 Kent 506. * * *

It is true that instruments cannot be construed by what parties may have been done under them, 1 H. & G. 74; but we think that courts may regard the nature of the transaction, and probable results; that is, such as may be supposed to have entered into the minds of the parties at the time the agreement was made; for justice seems to require that both parties should be bound by a consent of the mind to the same thing in the same sense.

Editor's Note—Twelve Rules of Construction.

1. Intent of parties as expressed in words must govern.
2. Words are to be taken in their ordinary sense.
3. In case of doubt preliminary negotiations ought to be considered.
4. Intention is not to be collected from detached parts, but from the whole of it.
5. Where there are several writings they will be construed together.
6. The contract includes all those things which the law implies as part of it.
7. A particular custom may be proved to vary the usual meaning.
8. Words are to be taken in the ordinary and popular sense.
9. Technical words are to be taken in a technical sense.
10. Where there is conflict between printing and writing the writing will prevail.
11. Words and phrases susceptible of two meanings, one of which will uphold the contract, and the other destroy it, the former will be adopted.
12. Where one construction will make a contract legal the other illegal, the former, if reasonable, will be adopted.—9 Cyc. 582 *et seq.*

PART IV

DISCHARGE OF CONTRACTS

Chapter X

AGREEMENT

Non-fulfilment of condition

WEAVER v. GRIFFITH, APPELLANT,
210 Pa. 13 (1904).

Bill in equity by purchaser for specific performance of a contract to sell land. Error assigned was decree of specific performance.

PER CURIAM: The defendant might have terminated the contract under the clause that "in case the said party of the second part doth not make payment as above specified at the time herein stated then this agreement is to be null and void, and all parties are to be released from all liabilities herein and all money previously paid forfeited." But the failure to make the payments at the stipulated times did not, of its own force, terminate the contract. It was not one of option, but of sale and purchase, and *prima facie* the time of payment was not of its essence. While a contract may provide that it shall be terminable at the will of either party, so that a purchaser may even terminate it by his own default, yet such effect will not be given to it unless the intent of both parties to that effect be made apparent by clear, precise and unequivocal language. The presumption is that the forfeiture clause is for the benefit of the vendor and enforceable at his election. Without such election and action the purchaser would not be released from his obligation to

pay, and equally the vendor would continue to be bound by his agreement to sell.

In the present case the court below found as a fact that the defendant had not elected to enforce his right of forfeiture, but by his conduct had substantially waived it. Thus retaining his right to enforce the contract against the purchaser to buy, he equally kept alive his own obligation to sell.

Decree affirmed.

Condition subsequent

RAY *v.* THOMPSON,
12 Cushing (Mass.) 281 (1853).

Assumpsit for the price of a horse sold to defendant. Defense, sale on condition that defendant might return the horse, and that he had returned it. Verdict for defendant.

Plaintiff offered to prove that defendant has so abused the horse that it was materially injured and lessened in value and the plaintiff had refused in consequence to receive it back. This evidence was excluded and plaintiff excepted to the ruling.

BY THE COURT: The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition, and

if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an *indebitatus assumpsit*, without setting out the conditional contract. *Moss v. Sweet*, 3 Eng. Law & Eq. 311.

New trial ordered.

Substituted agreement

ALVAN ROGERS & OTHERS *v.* ROGERS &
BROTHER,

139 Mass. 440 (1885).

Contract for the breach of an agreement to sell goods. Trial in the Superior Court, without a jury, before Gardner, J., who reported the case for the determination of this court, in substance as follows:

The plaintiffs introduced evidence tending to show that, on or about July 8th, 1879, the defendant, a manufacturing corporation located in Connecticut, by its agent, C. A. Hamilton, orally agreed to sell and deliver to the plaintiffs in Boston, from time to time, as ordered by them, such silver-plated ware—namely, spoons and forks—as they might need in their business, and order during the season—that is, between July and January 1, 1880—at stipulated discounts from certain list prices, and that the goods were to be paid for at the end of each month; that, pursuant to this contract, and on the day of its date and at different times previously to October 14, 1879, the plaintiffs ordered goods amounting in the aggregate to several thousand dollars, a part of which were delivered and paid for according to the contract; that, on said October 14th, the defendant utterly repudiated its contract, and refused to fill any of the un-

filled orders, or to receive and fill any future orders, except upon the express promise on the part of the plaintiffs to pay for the goods at a less rate of discount than that stipulated in the contract, the effect of which was to advance the price of said goods about eight and one-fourth per cent. on the agreed price; that the plaintiffs, after several days' delay, and not being able to buy the goods elsewhere on so favorable terms, or at any price, agreed to buy them of the defendant during the remainder of the season upon the new terms demanded by the defendant. * * *

FIELD, J.: We infer from the report, that the court found that the contract was not merely an offer by the defendant to sell, which would have been revocable at any time, except so far as it had been accepted by the plaintiffs in giving orders, and would thus be a contract only to the extent of those orders; but that it was a contract whereby the plaintiffs agreed to buy, and the defendant agreed to sell, such of the goods dealt in by the defendant as the plaintiffs needed in their trade during the time specified. See *Dickinson v. Dodds*, 2 Ch. D. 463. The plaintiffs were bound in law to pay for the goods sent after the new agreement was made according to the prices stipulated in that agreement. In this Commonwealth the delivery of the goods by the defendant under the new agreement, whether they were sent to fill the orders given before October 14th, or the orders given after, is considered a sufficient consideration for the new promise of the plaintiff. Whether the new agreement was substituted for the old, and thus operated as a rescission or discharge of it, must be determined by the intention of the parties, to be ascertained from their correspondence and conduct. *Munroe v. Perkins*, 9 Pick. 298.

If we assume that the original agreement was sufficiently definite to constitute a valid contract, as it was a continuing contract, the parties could clearly substitute for it a new contract, which should determine their rights and

liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that the new contract was not intended to be a discharge of the breach. As to the orders given before October 14, which the defendant had refused to fill, if the new contract by its terms covered those, we think the same rule holds. If the parties agreed that these orders should be filled at the prices stipulated for in the new contract, without considering whether the new agreement would of itself be a discharge of these partial breaches, performance of the new agreement would operate as a discharge, or an accord and satisfaction, unless it appeared that such was not the intention of the parties. Such a substituted agreement *prima facie* takes the place of the original agreement as to everything remaining unperformed.

Our construction of the correspondence and conduct of the parties is, that it was not understood or intended by both parties that the plaintiffs should retain their right of action, if they had any, for the alleged breach of the original contract.

Judgment for the defendant.

Chapter XI

PERFORMANCE

GILLESPIE TOOL CO. *v.* WILSON ET AL.,
123 Pa. 19 (1888).

Assumpsit on a contract for drilling a well. Defense, non-performance. Non-suit. Plaintiff appeals.

Plaintiff agreed to drill for defendants a gas-well 2000 feet deep and five and five-eighths inches in diameter. In case salt water was struck, the well was to be eight inches in diameter in order to shut off the salt water. A well was dug to the depth of between 1500 and 1600 feet, when, owing to an accident, it had to be abandoned. Another well was then begun, and when at a depth of 800 feet plaintiff was notified that defendants held the contract was for the first well and would not be responsible for the second. Plaintiff continued and drilled the second well to a depth of 2204 feet, but struck salt water at a depth of 1729 feet, and to case this off reduced the hole to admit of casing four and one-quarter inch size. Plaintiff claimed a substantial performance on the ground that the well was for testing the territory, and that for this purpose a four and one-quarter inch hole was as good as a five and five-eighths inch, and that it would have been a useless expense to ream it out to the latter diameter when the experiment proved that the territory did not produce gas.

MR. JUSTICE STERRETT: Plaintiff company neither proved nor offered to prove such facts as would have warranted the jury in finding substantial performance of the contract embodied in the written proposition submitted to and accepted by the defendants. In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one-half of the well was not reamed out, as required, to an eight-inch diameter so as

to admit five and five-eighths inch casing in the clear. About 180 feet of the lower section of the well also was bored four or four and one-quarter inches instead of five and five-eighths inches in diameter. In neither of these particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement. To have done so would have involved nothing more than additional time and increased expense. The fact was patent, as well as proved by undisputed evidence, that a four and one-quarter inch well would not discharge as much gas as one five and five-eighths inches in diameter. It is no answer to say that for the purpose of testing the territory a four and one-quarter inch well was as good as a five and five-eighths inch well; nor that reaming out the well to the width and depth required by the contract would have subjected defendants to additional expense without any corresponding benefit. That was their own affair. They contracted for the boring of a well of specified depth, dimensions, etc., and they had a right to insist on at least a substantial performance of the contract according to its terms. That was not done, and the court was clearly right in refusing to submit the case to the jury on evidence that would not have warranted them in finding substantial performance of the contract.

The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no wilful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury. There is nothing in the record that requires a reversal of the judgment.

Judgment affirmed.

Chapter XII

IMPOSSIBILITY

Destruction of subject matter

DEKTER v. NORTON ET AL.,
47 N. Y. 62 (1871).

Appeal from a judgment entered upon an order of the General Term of the Supreme Court in the first judicial district, overruling plaintiff's exceptions, and directing judgment dismissing the complaint, in accordance with ruling of the court at circuit.

This action is brought to recover damages for a breach of a contract to sell and deliver cotton. Defendants, on the 5th day of October, 1865, at the City of New York, agreed to sell and deliver to the plaintiff 607 bales of cotton, bearing certain marks and numbers, specified in the contract, at the price of forty-nine cents per pound, and fourteen bales, bearing marks and numbers, specified in the written contract, at the price of forty-three cents per pound, the cotton to be paid for on delivery. Defendants delivered to the plaintiff 460 bales of the said cotton, the remaining 161 bales were accidentally destroyed by fire without fault or negligence of the defendants. Cotton rose in value after the sale, and plaintiff claimed to recover the increase on the 161 bales. The court dismissed the complaint, upon the ground that a fulfilment of the contract by the sellers had become impossible by the destruction, without their fault, of the subject matter of the sale, and they were, therefore, excused from the obligation to perform their agreement.

Plaintiff excepted.

CHURCH, C. J.: The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor. *Joyce v. Adams*, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident, nor even those events denominated acts of God will excuse him, and the reason given

is that he might have provided against them by his contract. *Paradine v. Jane*, Aleyn, 27.

But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. 2 *Smith's Leading Cases*, 50.

The same rule has been laid down as to property: "As if A. agrees to sell and deliver his horse *Eclipse* to B. on a fixed future day, and the horse die in the interval, the obligation is at an end." *Benjamin on Sales*, 424. In replevin for a horse, and judgment of *retorno habendo*, the death of the horse was held a good plea in an action upon the bond. 12 *Wend.* 589. In *Tylor v. Caldwell* (113 E. C. L. R. 824). A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged

from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In *School District No. 1 v. Dauchy* (25 Conn. 530), the defendant had agreed to build a school-house by the first of May, and had it nearly completed on the twenty-seventh of April, when it was struck by lightning and burned; and it was held, that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject matter of the contract; and this is the rule of the civil law. *Pothier on Contracts and Sale*, art. 4, 1, p. 31.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business, we may infer, did protect himself by insurance; but in establishing rules of liability in commercial transactions it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property

bargained, without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself, cannot legitimately operate to effect the principle involved.

Judgment affirmed.

Chapter XIII

OPERATION OF LAW

CLIFTON *v.* JACKSON IRON CO.,
74 Mich. 183 (1889).

CAMPBELL, J.: Plaintiff sued defendant for trespass in cutting his timber in the winter of 1885-6. The defense set up was that the timber, though on plaintiff's land, belonged to defendant. This claim was based on the fact that on September 22, 1877, a little more than eight years before the trespass, defendant made a contract to sell the land trespassed on to plaintiff, but with this reservation:

"Reserving to itself, its assigns and corporate successors the ownership of pine, butternut, hemlock, beech, maple, birch, ironwood or other timber suitable for sawing into lumber, or for making into firewood or charcoal, now on said tract of land, and also the right to cut and remove any or all of said timber, at its option, at any time within ten years from and after the date of these presents."

There were some unimportant provisions, also, not now material. Plaintiff showed that on November 4, 1885, the defendant conveyed to him the land in question by full warranty deed, and with no exceptions or reservations whatever. The testimony of defendant's agent, who cut the land, tended to prove that when the cutting was done the defendant's manager did not dispute plaintiff's title, but gave the agent to understand that it belonged to plaintiff, but that some arrangement would be made about it; that plaintiff was then absent, and there was no conversation with him or his wife on the subject. The bill of exceptions certifies that no other evidence was given concerning the right to cut timber. Upon these facts the court held that

the deed conveyed the right in the timber to plaintiff, and that he owned it.

Had no deed been made, it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected. Neither need we consider whether, after such a deed, there might not be such dealings as to render such timber-cutting lawful, by license, express or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties.

Judgment affirmed.

Editor's Note.—Where deeds are executed and accepted in performance of executory contracts to convey, the latter become *functus officio*, and thenceforth the rights of the parties are to be determined by the deeds, and not by the contracts, the presumption being that the deeds give expression to the final purposes of the parties; and the deeds will be conclusive unless it be shown that the grantees have been led by fraud or mistake of fact to accept something different from what the executory contracts called for in which cases the courts will give relief. *Griswold et al. v. Eastman et al.*, 51 Minn. 189.

Chapter XIV

BREACH

Transfer in fraud of contract obligation

WOLF v. MARSH,

54 Cal. 228 (1880).

Action on an instrument in writing. Judgment for plaintiff. Defendant appeals.

The instrument was as follows:

"MARTINEZ, November 24th, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hundred and forty-nine dollars, with interest at one per cent. per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"C. P. MARSH."

On November 1, 1871, defendant conveyed his interest in the ranch to one Williams. Up to that date the mines had yielded defendant no profits.

SHARPSTEIN, J.: * * * Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However, great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that, "if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired." Bishop on Cont. 690 (1426).

That this case is within that principle, we do not entertain a doubt. When the note was executed, the defendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note, he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that, he violated his contract, and the note at once became due and payable; and as this action was commenced within four years after that, it follows that the judgment and order of the court appealed from must be affirmed.

Renunciation

WINDMULLER ET AL. *v.* POPE ET AL.,
107 N. Y. 674 (1887).

This was an action to recover damages for alleged breach of a contract to purchase a quantity of iron. Verdict for plaintiffs. Judgment affirmed at General Term.

In January, 1880, the parties entered into a contract for the sale by plaintiffs and purchase by defendants of "about twelve hundred tons old iron, Vignol rails, for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia, or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton * * * deliverable in vessels at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, or any part of it, and advised that plaintiffs better stop at once in attempting to carry out the contract. Plaintiffs thereupon sold the iron abroad which they had purchased to carry out the contract.

PER CURIAM: We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it, and by a sale of the iron to other parties changed their position. *Dillon v. Anderson*, 43 N. Y. 231;
* * *

The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery.

Judgment affirmed.

DAMAGES FOR BREACH OF CONTRACT

6 Bingham 141 (1829).

The action was brought between the plaintiff and defendant agreed to act as Royal, Covent Garden, commencing October, to the usual regulation Garden; and the plaintiff 8d. every night on theatrical performances, the defendant should each season, on certain agreement contained a should neglect or refuse part thereof, or any stipulation should pay to the other was thereby agreed the omission, neglect, or any sum was thereby declared and ascertained damages, and in the nature thereof.

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breach, the jury, upon the trial, assessed the damages at £750; which damages the plaintiff contends ought by the terms of the agreement to have been assessed at £1000.

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement, only

which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Weldon*, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in His Majesty's Courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.

In accord—*Signal v. Gould*, 119 U. S. 495.

Measure of damages

HADLEY AND ANOTHER *v.* BAXENDALE AND OTHERS,

9 Exchequer 341 (1854).

* * * At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on

an extensive business as millers at Gloucester, and that, on May 11th, their mill was stopped by a breakage of the crank-shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Company, for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by 12 o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

* * * The judgment of the Court was now delivered by

ALDERSON, B.: We think that there ought to be a new trial in this case, but in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge,

at the next trial ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this, for if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and in *Blake v. Midland Railway Company*, 21 L. J., Q. B. 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at *nisi prius*.

"There are certain established rules," this Court says, in *Alder v. Keighley*, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "And here there is clear rule, that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as much as may fairly and reasonably be considered either arising naturally—that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had

in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or again, suppose that, at the time of the delivery to the car-

rier, the machinery of the mill had been in other respects defective, then also the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case.

Rule absolute.

THEIS *v.* WEISS,

166 Pa. 9 (1895).

Appeal on a verdict for plaintiff. Assumpsit to recover damages. For failure to deliver flour under contract in writing contract is as follows: Pitts. Aug. 4, 1891.

Messrs. Theo. Weiss sold Peter Theis 100 cars of straight flour to be delivered on Peter Theis' order, cars to contain 200 barrels each, each car of flour to be equal to Theis and Kuegle and Co. flour, to be delivered two cars per day. Pay sight draft with bill of lading attached, price to be \$4.00 per barrel bulk. Signed Theodore Weiss. Witness C. McMaster.

Opinion. The plaintiff testified on the trial positively and directly that he sold all the flour he bought from the defendant to various firms and individuals immediately after the contract in suit was made. He also said he was obliged to purchase the flour to fill these orders. He was permitted to prove and did prove the low price of the flour during the time he was making the sales. He admitted, however, that he got most of the flour with which to fill these orders from his home field. The defendant asked the plaintiff what the flour he thus obtained cost him and whether he made or lost money on the flour he obtained to fill these orders. Court rejected these offers of proof; and the assignment of error to the rejection of the offers and to what the court below said on the question of measure of damages give rise to the question, what is the true measure of damages applicable to the facts in the case. The Court charged that it was the difference between the contract price named in the contract in suit and the market price of the same grade of flour at the time and place of delivery. There is no doubt that this is the general rule in cases where the vendor of goods refuses to deliver and no part of the price has been paid. But the defendant contends that the rule is this; where the vendee supplies himself with other goods in order to fill orders which he has taken for the resale of the goods which he contracted to receive from the vendor.

In 2 Benj. on Sales, Sec. 1327, the writer says: "It is submitted that these decisions establish the following rules in cases where goods have been bought for the purpose of

resale and there is no market in which the buyer can readily obtain them :

First, if at the time of the sale the existence of a sub-contract is made known to the seller the buyer on the sellers' default in delivering the goods has two courses open to him. He may elect to fulfill his sub-contract and the market would purchase the best substitute obtainable charging the seller with the difference between the contract price of the goods and the price of the goods substituted.

Second, he may elect to abandon his sub-contract and in that case he may recover as damages against the seller his loss of profits on the sub-sale and any penalties he may be liable to pay for breach of sub-contract. * * *

In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business and done all in his power to mitigate the loss." "The value of the article at, or about the time is to be delivered for the measure of damages in a suit by the vendee against the vendor for a breach of the contract. * * *

It is therefore, proper to inquire into the true legal idea of damages in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice or negligence enter into the question the declared object is to give compensation to the party injured for the actual loss sustained."

Kounts v. Kirkpatrick, 72 Pa. 376, and authorities there cited. The true rule said C. J. Gibson is to give actual compensation by graduating the amount of the damages exactly to the extent of the loss.

Forsyth v. Palmer, 2 Harris 97. In *Haskell v. Hunter* 23 Mich. 305, it was held that in an action for the non-delivery of lumber the true measure of damages is the difference between the contract price and what it would have cost the plaintiff to protect it at the place of delivery and at the time or times when it was reasonably proper for them to

supply themselves with the lumber of the kind and quality they were to receive under the contract. We are therefore of the opinion that the defendant should have been allowed to prove what was the actual cost to the plaintiff of the flour which the plaintiff said he bought from other parties to fill his orders.

Judgment reversed and a new venire ordered.

Equitable relief from breach of contract

PHILADELPHIA BALL CLUB v. LAJOIE, 202 Pa. 210.

Bill in equity for an injunction.

POTTER, J.: The defendant in this case contracted to serve the defendant as a base ball player for a stipulated time. During that period he was not to play for any other club. He violated this agreement, however, during the term of his engagement and in disregard of his contract arranged to play for another and a rival organization. Plaintiff by means of this bill, sought to restrain him during the period covered by the contract. The Court below refused the injunctions holding that to warrant the interference prayed for "the defendant's services must be unique, extraordinary and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the Court the plaintiff's qualifications did not measure up to this high standard. We think that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him the Court has taken extreme ground. It seems to us that a more just and equitable rule was laid down in *Pomeroy* on specific performance, p. 31, where the principle is thus declared: "Where one person claims to render personal services to another

which require and presuppose a special knowledge, skill and ability in the employee so that in case of default the same service could not easily be obtained from others. Although the affirmative specific performance of the contract is beyond the power of the court its performance will be negatively enforced by enjoying the breach. * * *

The damages for breach to such a contract cannot be estimated with any certainty and the employer cannot by means of any damages breach the same service in the labor market. The court below finds from the testimony that the defendant is an expert base-ball player in any position; that he has a great reputation as second baseman; that his place would be hard to fill with as good a player, that his withdrawal from the team would weaken it as would the withdrawal of any good player and would probably make a difference in the size of the audiences attending the game."

In addition to these features, which render his services of peculiar and special value to the plaintiff and not easily replaced, Lajoie is well known and has a great reputation among the patrons of this sport and ability in the position which he filled and was thus a most attractive drawing card for the public. He may not be the sun in the base-ball firmament; but he is certainly a bright star. We feel, therefore, that the evidence in this case justifies the conclusion that the services of defendant are of such unique character and display knowledge, skill and ability as renders them of peculiar value to the plaintiff and so difficult of substitution that their loss will produce irreparable injury in the legal significance of that term to the plaintiff. The action of the defendant in violating this contract is a breach of good faith for which there would be no adequate redress at all and the case therefore properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoying against its breach. But the court below was also of the opinion that the contract was lacking in mutuality of remedy and considered that as a controlling rea-

son for the refusal of an injunction. In the contract now before us the defendant agrees to furnish skilled professional services to the plaintiff for a period which might extend over three years by proper notice given before the close of each current year. Upon the other hand, the plaintiff retains the right to terminate the contract upon ten days' notice and the payment for salary for that time and the expense of defendant in getting from his home. But the fact of this concession of the plaintiff is distinctly pointed out as part of the consideration for a large salary paid to the defendant and is emphasized as such. We are not persuaded that the terms of this contract manifest any lack of mutuality and remedy each party as a possibility of enforcing all the rights stipulated for in the agreement. We can agree that mutuality of remedy requires that each party should have precisely the same remedy either in form, effect or extent in a fair and reasonable contract in order to be sufficient; that each party has the possibility of compelling the performance of the promises which were mutually agreed upon. The defendant sold to plaintiff for a valuable consideration the exclusive right for the professional services for a stipulated period unless sooner surrendered by the plaintiff; which could only be after due and reasonable notice and payment of salary and expenses until the expiration. Why should not the Court of Equity protect such an agreement until it is terminated? The Court cannot compel the plaintiff to play for the defendant, but it can restrain him from playing for another club in violation of his agreement. No reason is given why this should not be done except that presented by the argument that the right given to plaintiff to terminate the contract upon ten days' notice destroys the mutuality of the remedy. Substantial justice between the parties require that the Court should restrain the defendant for playing for any other club during his term contract with the plaintiff.

Decree of the Court below reversed and bill reinstated.

APPENDIX

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The outline which follows is reproduced by permission of the American Law Book Co. The parts of this outline on the subjects of "Conflict of Laws" and "Actions for Breach of Contract" have been omitted. Under the head of the "Parties," there has been inserted parts of the outlines on "Infants," "Insane Persons" and "Married Women" given under separate articles in "Cyc." The outline on "Infants" was written for "Cyc" by John Walker Macgrath, that on "Insane Persons" by Henry F. Boswell and that on "Married Women" by William L. Burdick.

CONTRACTS

BY JOHN DAVISON LAWSON
Dean of Law Department, University of Missouri*

I. DEFINITION

- A. Contract Defined
- B. Express, Implied, and Quasi or Constructive Contracts
 - 1. Express Contracts
 - 2. Implied Contracts
 - 3. Quasi or Constructive Contracts
- C. Executory and Executed Contracts
- D. Promise Defined
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- F. Bilateral and Unilateral Contracts
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II. AGREEMENT OR MUTUAL ASSENT

- A. Necessity For
- B. Essentials of Agreement in General
 - 1. Two or More Parties
 - 2. Common Intention
 - a. In General
 - b. Expressed Intention and Secret Intention Differing
 - c. Communication of Intention
 - (I) Necessity For
 - (II) Intention Communicated Informally
- C. Offer and Acceptance
 - 1. In General
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 - b. Forms of Offer
 - (I) In General
 - (II) Offer of Promise For Assent
 - (III) Offer of Act For Promise
 - (IV) Offer of Promise For Act
 - (V) Offer of Promise For Promise

*Author of "Rights, Remedies and Practice, at Law, in Equity and under the Codes," "Lawson's Ballments," "Lawson's Contracts," "Lawson's Expert and Opinion Evidence," "Lawson's Presumptive Evidence," "Lawson's Usages and Customs," "Lawson's Defenses to Crime," "Lawson's Concordance," etc., etc.

- c. Certainty of Offer
 - (i) In General
 - (ii) No Uncertainty if Intention Can Be Ascertained
- d. Terms of Offer
 - (i) In General
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 - (A) In General
 - (B) Usages and Customs of Trade
 - (iii) Terms Not Appearing on Face of Offer
- e. Communication of Offer
 - (i) In General
 - (ii) Performance of Services and Other Acts Without Request or Knowledge
 - (iii) Performance of Services and Other Acts Without Knowledge of Offer
- 3. Acceptance of Offer
 - a. Necessity For
 - b. Who May Accept
 - (i) Particular Offers
 - (ii) General Offers
 - c. Forms of Acceptance
 - (i) Acceptance by Assent
 - (ii) Acceptance by Promise
 - (iii) Acceptance by Act
 - (iv) Acceptance by Silence
 - (v) Acceptance by Signing Paper Containing Offer
 - (vi) Acceptance by Accepting Paper Containing Terms
 - (A) In General
 - (B) Paper Not Purporting to Be a Contract
 - (C) Terms Not Readily Discernible
 - (D) Terms Unreasonable
 - (E) Where Case Is One of General Notice
 - (F) Notice Received After Agreement
 - d. Sufficiency of Acceptance
 - (i) Conditions Prescribed by Offer
 - (A) In General
 - (B) Conditions as to Time of Acceptance
 - (C) Conditions as to Place of Acceptance
 - (D) Conditions as to Mode of Acceptance
 - (ii) Acceptance Conditionally or on Terms Varying From Offer
 - (iii) Offerer's Acceptance of Conditional or Varying Acceptance

- e. Communication of Acceptance
 - (i) In General
 - (ii) Acceptance by Act
 - (iii) Acceptance by Promise
 - (iv) Meaning of Communicated
- 4. Intention to Effect Legal Relations
 - a. In General
 - b. Social Engagements
 - c. Jokes or Jests
 - d. Statements of Intention and Promissory Expressions
 - e. Proposals to Deal
 - f. Advertisements of Goods For Sale
 - g. Invitations to Bid
 - h. Railroad and Steamship Time-Tables
 - i. Advertisement of Auction Sales
 - j. Advertisement of Theaters and Shows
 - k. Announcement of Examination For Scholarship
 - l. Negotiations Looking to Formal Contract
- 5. Revocation of Offer or Acceptance
 - a. Of Offer
 - (i) After Acceptance
 - (ii) Before Acceptance
 - (iii) Offer Giving Time For Acceptance
 - (iv) Consideration For Giving Time
 - (v) Offer Under Seal
 - (A) In General
 - (a) Options Under Seal
 - b. Revocation of Acceptance
 - c. Communication of Revocation
 - (i) In General
 - (ii) General Offers
- 6. Lapse of Offer
 - a. By Rejection, Conditional or Varying Acceptance or Counter Offer
 - b. By Lapse of Time
 - (i) In General
 - (ii) Questions of Law and Fact
 - c. By Death or Insanity
 - d. By Change of Circumstances
- 7. Offer and Acceptance by Post or Telegraph
 - a. In General
 - b. When Offer Is Complete
 - c. Acceptance by Post or Telegraph

- d. Agreement Concluded When Acceptance Posted or Telegraphed
- e. Letter Must Be Properly Stamped, Addressed, and Posted
- f. Offer Requiring Actual Receipt of Acceptance
- g. Revocation of Offer
- h. Post Office Regulations as to Reclaiming Letters

III. FORMAL REQUISITES

- A. Seal
- B. Writing
 - 1. Necessity For
 - 2. Where Writing Essential Outside of Statutes
 - 3. Form of Language
 - 4. Agreement in Several Writings
 - 5. Agreement Partly Written and Partly Oral
- C. Signing
 - 1. Necessity For
 - 2. Agreement Signed by One and Adopted by the Other
 - 3. Parties Signing Bound
 - 4. Mode of Signing
 - 5. Signing by Procurement or Adoption
- D. Delivery
- E. Date
- F. Leaving Blanks in Writing

IV. CONSIDERATION

- A. Definition
- B. Necessity For Consideration
 - 1. In General
 - 2. Contracts in Writing
 - 3. Contracts Under Seal
 - 4. Gratuitous Bailment
 - 5. Statutory Obligations
- C. Presumption of Consideration
 - 1. Negotiable Instruments
 - 2. Written Contracts Generally
- D. What Constitutes a Consideration
 - 1. In General
 - 2. Illustrations of Sufficient Consideration
 - 3. Need Not Be Money or Money Value
 - 4. Benefit to Third Person
 - 5. What Is Not a Consideration
 - a. In General
 - b. Illustrations of No Consideration

- c. Promise to Make Gift
- d. Promise to Pay Money
- e. Promise to Pay Debt of Third Person
- 6. Good and Valuable Consideration Distinguished
- 7. Motive and Consideration Distinguished
- 8. Marriage and Promise to Marry
- 9. Executed and Executory Consideration
 - a. In General
 - b. Acceptance of Executed Consideration
 - c. Consideration Executed Upon Request
- 10. Mutual Promises
 - a. In General
 - b. Promises Must Be Concurrent
 - c. Promise Must Impose Legal Liability
 - d. Promise Must Be Certain
 - e. Promise Must Be Legal
 - f. Performance Must Be Possible
 - (i) In General
 - (ii) Physical Impossibility
 - (iii) Legal Impossibility
 - g. Promise May Be Conditional
 - h. Mutuality
 - (i) In General
 - (ii) Subscriptions
 - (A) Mutual Promises
 - (B) Implied Agreement to Perform
 - (C) Actual Performance
 - (iii) Mutuality May Be Implied
 - (iv) Executed Contracts
 - (v) Mutuality Subsequently Present
 - (vi) Options Founded on Consideration
 - (vii) Writings Signed by One Party Only
- 11. Waiver of Legal Right and Forbearance
 - a. In General
 - b. Illustrations of Waiver of Right or Forbearance
 - c. Forbearance to Sue
 - (i) In General
 - (ii) Different Views as to Existence of Right to Sue
 - (A) View That Right Must Be Perfect
 - (B) View That Right Must Be Reasonably Doubtful
 - (C) Claims Clearly Unenforceable
 - (D) View That Claim Must Be Bona Fide

- d. Right May Be Against Third Person
- e. Promise to Forbear and Actual Forbearance
- f. Mutual Promises to Forbear
- g. Time of Forbearance
- h. Compromise of Claims
- i. Abandonment or Discontinuance of Proceedings
- j. Discharge From Custody Under Writ
- k. Relinquishment of Defenses or Rights in Suit
- 12. Promise to Do or Doing What Promisor Is Bound to Do
 - a. In General
 - b. Subsisting Obligation in Law
 - c. Subsisting Contractual Obligation
 - (I) In General
 - (II) Anomalous Views
 - (A) Right Either to Perform or Pay Damages
 - (B) Evidence of Mutual Rescission
 - (C) Both Contracts in Force
 - (D) Unforeseen Difficulties and Mistake
 - (III) Exceptions
 - (A) Matters Outside of Contract
 - (B) Moral Obligation
 - (C) Substituted Agreement
 - d. Existing Contractual Obligation to Third Person
 - e. Part-Payment of Debt and Agreement to Discharge Residue
 - (I) In General
 - (II) Compositions With Creditors
- 13. Moral Obligation
- 14. Past Consideration
 - a. In General
 - b. Previous Request
 - c. Moral Obligation
 - (I) In General
 - (II) Moral Obligation Founded on Previous Benefit to Promisor
 - (III) Moral Obligation Founded on Fraud or Duress
 - d. Promise in Pursuance of Previous Understanding
 - e. Subsidiary Promises
 - f. Consideration Partly Past and Partly Present or Executory
 - g. Pre-Existing Liability
 - h. Former Promise Unenforceable by Act of Law
 - (I) In General
 - (II) Statute of Limitations

- (iii) Bankruptcy or Insolvency Laws
- (iv) Contracts of Married Women
- (v) Contracts of Infants and Insane Persons
- (vi) Contracts Unenforceable Under Law Since Repealed

- i. Incurring Legal Liability at Request
- j. Voluntarily Doing What Promisor Is Bound to Do
- k. Consideration Expressed in Past Tense

E. Adequacy of Consideration

- 1. In General
- 2. Exceptions
 - a. In General
 - b. In Equity

F. Necessity For Consideration to Appear on Writing

G. Contradicting Statement of Consideration

H. Failure of Consideration

- 1. In General
- 2. Partial Failure of Consideration
- 3. Subsequent Depreciation in Value

V. PARTIES

A. Two or More Parties Essential

B. Capacity to Contract

C. Parties Entitled to Enforce Contract

- 1. In General
- 2. Where False Representation Is Made
- 3. Where Breach of Duty Is Connected with Contract
- 4. Promise For the Benefit of Third Persons
 - a. Doctrine That Third Person Cannot Sue
 - (i) In General
 - (ii) Exceptions
 - (A) Trust
 - (B) Quasi Contract
 - (c) Near Relationship
 - (D) Agency
 - (E) Novation
 - b. Doctrine That Third Person Can Sue
 - (i) In General
 - (ii) Limits to the Doctrine That Third Person May Sue
 - (A) In General
 - (B) Contract Under Seal
 - (c) Contract Must Be Binding
 - (D) Failure of Consideration and Rescission of Contract

D. Parties Against Whom Contracts May Be Enforced

1. In General
2. Assignees and Representatives
3. Principals and Agents
4. Ratification by Receipt of Benefits
5. Contract May Impose Duty on Third Persons

E. Persons Not Having Full Contractual Ability**I. Infants****a. Who are Infants**

- (I) Definition
- (II) Age of Majority
 - (A) In General
 - (B) When Age Deemed Attained
 - (C) What Law Governs

b. Privileges and Disabilities**(I) Privileges**

- (A) Immunity From Prejudice by Lapse of Time or Laches
- (B) Immunity From Estoppel

(II) Disabilities

- (A) In General
- (B) Appointment by Agent or Attorney
- (C) Acting as Agent
- (D) Acting as Trustee
- (E) Eligibility to Public Office or Employment
- (F) Acting as Common Informer
- (G) Exercising Right of Election
- (H) Admissions
- (I) Removal of Disabilities
 1. Emancipation by Act of Parent
 2. Emancipation by Marriage
 3. Judicial Emancipation

c. Contracts**(I) Capacity to Contract**

- (A) In General
- (B) Whether Contracts Void or Voidable
- (C) Executed and Executory Contracts
- (D) Contracts by Person Acting For Infant
- (E) Contracts of Infant as Agent or Trustee
- (F) Contracts Pursuant to Legal Obligation
- (G) Contracts Pursuant to Statutory Authority
- (H) Where Contract on Part of Adult Legally Compulsory

- (i) Where Infant Engaged in Business
 - 1. In General
 - 2. Partnership
- (j) Contracts Jointly With Adults
- (ii) Particular Acts and Contracts Considered
 - (A) Accounts Stated
 - (B) Bills and Notes
 - (C) Bonds
 - (D) Charter-Parties
 - (E) Compromises and Settlements
 - (F) Gambling Contracts
 - (G) Life Insurance
 - (H) Loans and Advances
 - (I) Necessaries
 - 1. General Rule
 - 2. Credit Must Be Given to Infants
 - 3. Express Contracts
 - 4. Executory Contracts
 - 5. What Are Necessaries
 - 6. Where Infant Already Sufficiently Supplied
 - 7. Where Infant Has an Allowance
 - 8. Where Infant Has Parents or Guardian
 - 9. Loans and Advances For Necessaries
 - 10. Necessaries of Wife and Family
 - 11. Question of Law and Fact
 - 12. Burden of Proof
 - 13. Amount of Recovery
- (J) Releases
- (K) Services
- (L) Submission to Arbitration
- (M) Subscription to Corporate Stock
- (N) Suretyship
- (O) Warranty
- (iii) Liability of Infant Husband For Antenuptial Debts of Wife
- (iv) Liability of Infants For Interest
- (v) Ratification of Contracts
 - (A) Power to Ratify
 - (B) Time For Ratification
 - 1. After Arrival at Majority
 - 2. Ratification After Commencement of Action

- (c) Necessity For Ratification
- (d) Requisites to Valid Ratification
 - 1. Ratification Must Be Voluntary
 - 2. New Consideration
 - 3. Whether Writing Necessary
 - 4. Knowledge of Non-Liability
- (e) Conditional Ratification
- (f) Partial Ratification
- (g) What Constitutes Ratification
 - 1. In General
 - 2. Acquiescence or Failure to Disaffirm
 - 3. Retention of Disposal of Property or Consideration
- (h) Evidence
- (i) Effect of Ratification
- (vi) Avoidance of Contracts
 - (A) Right to Avoid
 - 1. In General
 - 2. Who May Avoid
 - 3. Estoppel to Disaffirm
 - (a) In General
 - (b) False Representations as to Age
 - (B) Time For Avoidance
 - 1. During Minority
 - 2. Reasonable Time After Majority
 - (c) Necessity For Disaffirmance
 - (d) What Constitutes Avoidance
 - (e) Return of Property or Consideration
 - (f) Effect of Avoidance
 - 1. In General
 - 2. Recovery of What Was Paid or Parted With
 - 3. Recovery on Avoidance of Contract For Services

F. Torts

- 1. Liability in General
- 2. Acts Under Orders of Parent or Guardian
- 3. Acts of Agent or Servant
- 4. Torts Connected With Contracts
- 5. Age of Infant

INSANE PERSONS

- 1. Property and Conveyances
 - A. Capacity to Take and Hold Property
 - B. Capacity to Convey Property

- C. Validity of Conveyances
- D. Affirmance of Conveyances
- E. Avoidance of Conveyances
- 2. Contracts
 - A. Validity
 - 1. In General
 - 2. Whether Contracts Are Void or Voidable
 - 3. Effect of Inquisition and Guardianship
 - 4. Valid Contracts
 - a. Contracts Created by Law
 - b. Necessaries
 - c. Ignorance and Good Faith of Other Party
 - B. Nature and Extent of Incapacity
 - 1. In General
 - 2. Deaf and Dumb Persons
 - 3. Temporary and Periodical Insanity
 - 4. Monomania or Insane Delusions
 - C. Ratification and Avoidance
 - 1. In General
 - 2. Return of Consideration
 - 3. Avoidance as Against Third Persons
- 3. Torts
 - A. In General
 - B. Liability For Libel or Slander
 - C. Measure of Damages

MARRIED WOMEN

- 1. Contracts
 - A. Capacity to Contract in General
 - 1. Common Law, Equity, and Statutory Rules
 - 2. What Law Governs
 - 3. Duty of Third Persons to Take Notice
 - 4. Implied Contracts
 - B. Particular Classes of Contracts
 - 1. Lease From Third Person
 - 2. Lease to Third Person
 - 3. Employment of Counsel
 - 4. Employment of Servant
 - 5. Contract For Wife's Services
 - 6. Necessaries
 - 7. Loans
 - 8. Bills and Notes
 - 9. Purchases and Sales
 - 10. Guaranty or Suretyship
 - 11. Releases and Receipts

- C. Instruments Under Seal
- D. Ratification of Contracts
 - 1. After Dissolution of Coverture
 - 2. Ratification by Estoppel
 - 3. Ratification by Husband
- E. Avoidance of Contracts
- F. Antenuptial Contracts
- 2. Property and Conveyances
 - A. Capacity to Take and to Hold Property
 - B. Capacity to Convey
 - C. Requisites and Validity of Conveyances
 - 1. In General
 - 2. Joinder of Husband in Deed
 - D. Gifts
 - E. Ratification
 - 1. By Act of Party
 - 2. By Statute
 - F. Avoidance
 - 1. Grounds
 - 2. Who May Avoid
- VI. REALITY OF CONSENT**
 - A. In General
 - B. Mistake
 - 1. Definition
 - 2. Effect in General
 - 3. Agreement Presumed From Assent
 - 4. Effect of Signing Written Instrument
 - a. In General
 - b. Person Unable to Read
 - c. Fraud
 - d. Substituted Document
 - 5. Effect of Accepting Paper Containing Terms
 - 6. Mistake of Expression and Reformation
 - a. In General
 - b. Evidence Required
 - 7. Mistake of One Party Only
 - a. In General
 - b. As to Value, Quality, and Other Collateral Attributes
 - c. In Motive or Expectation
 - d. Of One Party Caused by the Other
 - e. Of One Party Known to the Other
 - 8. Mutual Mistake
 - a. As to Material Facts

- b. As to Extrinsic Facts
 - c. When Facts Doubtful and Parties Assume Risk
 - d. As to Terms of Agreement
 - (i) Offer and Acceptance Not Identical
 - (ii) Where Terms of Agreement Are Not Ambiguous
 - e. As to Existence of Subject-Matter
 - (i) In General
 - (ii) Absolute Unconditional Agreement
 - f. As to Identity of Party
- 9. Mistake of Law
 - a. General Rule
 - b. Exceptions
 - (i) In General
 - (ii) Fraud, Undue Influence, and Abuse of Confidence
 - (iii) Foreign Laws
- 10. Remedies
- C. Misrepresentation Without Fraud
 - 1. In General
 - a. At Law
 - b. In Equity
 - 2. Contracts of Special Nature
 - a. In General
 - b. Particular Contracts
 - 3. Parties in Fiduciary or Confidential Relations
 - 4. Terms or Conditions in Contract
 - 5. Estoppel
 - 6. Remedies
- D. Fraud
 - 1. Definition
 - 2. What Constitutes Fraud
 - a. In General
 - b. Failure to Disclose Facts
 - (i) In General
 - (ii) Active Concealment or Non-Disclosure
 - (iii) Where There Is a Duty to Disclose
 - c. Representation of Opinion
 - d. Representation of Intention or Expectation
 - e. Representation of Law
 - f. Fraud of Third Party Inducing Contract
 - g. Knowledge and Intent
 - (i) Knowledge of Falsity of Representation
 - (A) In General

- (s) Representation Not Believed to Be True
 - (c) Representation Unreasonably Believed to Be True
 - (d) Representation Subsequently Becoming False
 - (ii) Intent
 - (A) That Representation Be Acted Upon
 - (s) Intent to Defraud
 - h. Materiality of Representation
 - (i) In General
 - (ii) Representation as to One of Several Matters
 - i. Reliance on Representation
 - (i) In General
 - (ii) Party Relying on His Own Judgment
 - (iii) Representation Known to Be False
 - (iv) Lapse of Time
 - (v) Right to Rely on Representations
 - (A) In General
 - (s) Where Means of Knowledge Are at Hand
 - j. Damage Must Be Shown
3. Effect of Fraud
- a. Contract Voidable and Not Void
 - b. Remedies of Party Defrauded
 - (i) Affirming Contract and Suing For Damages
 - (ii) Rescission of Contract
 - (A) Rescinding and Suing For Damages
 - (s) Recovery of Money or Property
 - (c) Setting Up Fraud as a Defense
 - (d) Rescission or Cancellation in Equity
 - (x) Suing For Breach
 - (iii) Reformation in Equity
 - (iv) Contracts Under Seal
 - (v) Fraud in Obtaining Release
 - c. Limitations to Right to Rescind
 - (i) Mode of Election
 - (ii) Laches
 - (iii) Ratification by Acceptance of Benefits or Otherwise
 - (iv) Parties Must Be Placed in Statu Quo
 - (v) Contract Must Be Rescinded in Toto
 - (vi) Restoring Consideration
 - (A) In General
 - (s) Exceptions to Rule
 - (vii) Rescission as Against Third Persons

E. Duress

1. Definition
2. Effect
3. Common-Law Divisions of Duress
 - a. In General
 - b. Duress of Imprisonment
 - c. Duress Per Minas
 - (i) In General
 - (ii) Threats of Imprisonment
 - (iii) Threats of Injury to Property
 - d. What Is Not Legal Duress
4. The Modern Equitable Rule
 - a. The Old Rule
 - b. Modification of Rule
 - c. The Modern Doctrine
 - d. Threats of Bodily Harm
 - e. Threats of Injury to Property
 - (i) In General
 - (ii) Parties Not at Arm's Length
 - (iii) Lack of Consideration
5. Who Must Impose Duress
6. Upon Whom Duress Must Be Imposed

F. Undue Influence

1. Definition
2. Equity Jurisdiction
3. Classification
4. Due and Undue Influence Distinguished
5. Presumption of Undue Influence
6. Particular Relations
 - a. Family Relations
 - b. Confidential Relations
 - (i) Guardian and Ward
 - (ii) Trustees and Cestui Que Trust
 - (iii) Attorney and Client
 - (iv) Spiritual Advisers and Spirit Mediums
 - (v) Physician and Patient
 - (vi) Persons Engaged to Marry
 - (vii) Other Confidential Relations
 - c. Mental Weakness
 - d. Persons Unable to Read or Write
 - e. Necessity and Distress
7. Inadequacy of Consideration
8. Right to Rescind and Limitation
 - a. In General
 - b. Delay or Laches

VII. ILLEGALITY**A. In General****B. What Agreements Are Illegal****1. In General****2. Agreements in Violation of Positive Law****a. In General****b. Agreements in Violation of Rules of Common Law**

(i) Agreements Involving Commission of Crime

(ii) Agreements With Alien Enemies

(iii) Agreements Involving Civil Wrong

(iv) Agreements to Defraud Individuals

(v) Agreements to Defraud the Public Generally

(vi) Frauds on Sellers and Bidders at Auctions

(vii) Frauds on Creditors

(viii) Agreements by Agents, Trustees, and Others in Fiduciary or Confidential Capacities

(ix) Agreements to Waive Fraud

c. Agreements in Violation of Statutes

(i) In General

(ii) Statutes Merely Imposing a Penalty

(iii) Statutes Requiring License to Engage in Profession, Trade, or Business

(iv) Statutes Regulating Dealings in Articles of Commerce

(v) Waiver of Statutory Provisions by Agreement

(vi) Omission of Penalty For Prohibited Act.

(vii) Agreements Prohibited but Declared Not Void

3. Agreements Contrary to Public Policy**a. In General****b. History****c. Sources****d. Public Policy Varies With Time and Place****e. Federal Courts****f. Particular Agreements Contrary to Public Policy**

(i) In General

(ii) Interference With Administration of Government

(A) In General

(B) Interference With Legislative Action

(C) Interference With Executive or Administrative Action

(D) Interference With Pardoning Power

(E) Interference With Appointment of Public Officers

- (f) Interference With Fees or Emoluments of Public Officers
- (g) Interference With Duties of Quasi-Public Corporations
- (h) Interference With Elections
- (i) Interference With Courts of Justice
 - (1) In General
 - (2) Compounding Offenses
 - (a) In General
 - (b) The Agreement Not to Prosecute
 - (c) Proof of Commission of Crime
 - (d) Offenses Which May Be Compromised
 - aa. In General
 - bb. Bastardy
 - (3) Ousting Jurisdiction of Courts
 - (4) Reference to Arbitration
 - (5) Limiting Right to Prosecute or Defend Civil Action or Proceeding
 - (6) Champerty and Maintenance
- (iii) Injury to or Violation of Laws of Foreign State
- (iv) Aiding Public Enemy
- (v) Agreements Against Good Morals
- (vi) Agreements Affecting Marital Relations
 - (A) Restraint of Marriage
 - (B) Marriage Brokage Contracts
 - (C) Agreements to Dissolve Marital Relations
 - (D) Agreements For Separation
 - (E) Agreements to Resume Marital Relations
 - (F) Frauds Upon Marital Rights
- (vii) Agreements in Restraint of Trade
 - (A) In General
 - (B) The Early English Law
 - (C) The Later Doctrine With Its Divisions
 - (1) In General
 - (2) Restraint Unlimited as to Both Time and Space

- (3) Restraint Limited as to Time
but Unlimited as to Space
- (4) Restraint Limited as to Space
but Unlimited as to Time
- (5) Restraint Limited as to Both
Time and Space
- (D) The Modern Doctrine of Reasonable-
ness of Restraint
 - (1) In General
 - (2) Agreements Held Valid
 - (3) Agreements Held Void
 - (4) The Question of Public Interest
in Such Cases
- (E) Restrictions on Use of Patents
- (F) Restrictions on Sale of Trade-Marks
or Trade-Names
- (G) Restrictions on Sale of Secret Process
- (H) Other Agreements Restricting Liberty
of Doing Business
- (I) Consideration For Contract
- (J) Proof
- (K) Statutory Provisions
- (VIII) Other Agreements Injuring Personal Rights
- (IX) Agreements Affecting Duties Toward Third
Persons
 - (A) In General
 - (B) Agreements Affecting Duties of Par-
ents
 - (C) Agreements of Quasi-Public Corpora-
tions
 - (D) Agreements Exempting From Liability
For Negligence
 - (E) Agreements to Make Will
- C. Effect of Illegality
 - 1. In General
 - 2. Exceptions to the General Rule
 - a. In General
 - b. Where Public Policy Requires Intervention of
Court
 - c. Where Parties Are Not in Pari Delicto
 - d. Where One Party Is Protected By the Law
 - e. Where Illegal Purpose Is Not Consummated
 - f. Where Party Complaining Can Establish Case
Without Relying on Illegal Transaction

g. Person in Possession of Profits of Illegal Transaction

(i) In General

(ii) Agents and Partners in Illegal Enterprises

h. Recovery by Agent Against Principal

3. Right of Third Parties to Set Up Illegality

4. Form of Illegal Agreement

5. New Agreement on Same Consideration Void

6. Securities Given in Illegal Transaction

7. New Agreement on New Consideration

8. Effect of Illegal Agreement on Prior Legal One

9. Consideration or Promise Wholly Illegal

10. Consideration Legal but Promise Partly Illegal

11. Consideration Partly Illegal or Several Considerations

Some of Which Are Illegal

12. Promises and Considerations Severable

13. Intention

a. Unlawful Intention on Both Sides

(i) In General

(ii) When the Rule Does Not Apply

b. Unlawful Intention on One Side Only

c. Mere Knowledge of Unlawful Intention of Other Party

(i) In General

(ii) Contemplated Illegal Act Highly Immoral or Heinous

(iii) Where Illegal Purpose Is in View

(iv) Money Loaned

(v) Where Party Aids in Illegal Purpose

D. Conflict of Laws as to Time

1. In General

2. Agreement Illegal When Made but Afterward Legalized

3. Agreement Legal When Made but Afterward Prohibited

VIII. CONSTRUCTION

A. In General

B. Intention of Parties

1. In General

2. Secret Intention

3. Words to Be Taken in Ordinary Sense

4. Preliminary Negotiations

5. Whole Contract Looked at

6. Several Writings Construed Together

7. Papers Referred to or Annexed to Contract

C. Implied Terms

1. In General
2. Custom or Usage
3. Law of Place Implied

D. Words and Clauses

1. All Words to Be Considered
2. Meaning of Particular Words
3. Technical Words
4. Repugnant Words
5. Inconsistent and Conflicting Clauses
6. Writing and Printing
7. Expressio Unius
8. General and Specific Descriptions
9. Recitals
10. Clerical Errors and Omissions
11. Surplusage

E. Grammatical Construction

1. In General
2. Punctuation

F. Construction to Uphold Contract and to Exclude Fraud

1. Valid Rather Than Invalid
2. Construction as Legal Rather Than Illegal
3. Good Faith and Bad Faith

G. Reason and Equity

1. In General
2. Where Meaning Not Uncertain

H. Nature and Objects of Agreement and Situation of Parties**I. Construction of Parties**

1. In General
2. Where Meaning Not Uncertain
3. Opinion Not Carried Into Effect

J. Construction Against Party Using Words**K. Law and Fact****IX. DISCHARGE****A. Modes of Discharge****B. Discharge by Agreement**

1. By New Agreement
 - a. In General
 - b. Sufficiency of Agreement and Consideration
 - c. Substituted Agreement
 - (I) In General
 - (II) Effect as to Third Parties
 - d. Novation

- e. Implied Rescission
 - (i) Inconsistent Subsequent Agreement
 - (ii) Lapse of Time
- f. Form of New Agreement
 - (i) Contracts Under Seal
 - (A) In General
 - (B) Parol Contract at Variance With Sealed Contract
 - (C) Parol Agreement Acted On
 - (ii) Written Contract Not Under Seal
 - (A) In General
 - (B) Contracts Required by Statute to Be in Writing
- 2. Non Fulfilment of Term in Contract
 - a. Condition Subsequent
 - b. Occurrence of Particular Event
 - c. Option to Determine Contract
- C. Discharge by Performance
 - 1. Promise on Executed Consideration
 - 2. Contract Wholly Executory
 - 3. Strict and Substantial Performance
 - a. At Common Law
 - b. In Equity
 - c. Intentional or Material Departure
 - d. Recovery For Benefits Received
 - 4. Time of Performance
 - a. Where Time Is Fixed by Contract
 - (i) In General
 - (ii) Time of Essence or Not
 - (A) In General
 - (B) At Common Law
 - (C) In Equity
 - (D) Waiver and Estoppel
 - (iii) Construction of Agreement as to Time
 - b. Where No Time Is Fixed by Contract
 - (i) In General
 - (ii) What Is a Reasonable Time
- 5. Performance of Conditional Promises
 - a. In General
 - b. Conditional Upon Time
 - c. Conditional Upon Future Event
 - d. Conditional Upon Specified Fund
 - e. Conditional Upon Request or Demand
 - f. Conditional Upon Notice

- g. Conditional Upon Act or Will of Third Person
- h. Conditional Upon Act or Will of Promisor
- i. Performance to Satisfaction of Promisor
 - (i) In General
 - (ii) Cases of Fancy, Taste, or Judgment
 - (iii) Cases of Operative Fitness or Mechanical Utility
 - (A) In General
 - (B) Conflicting Decisions
 - (iv) Bad Faith
 - (v) Condition a Suspensory One
 - (vi) Waiver of Condition
- 6. Discharge By Payment or Tender
- D. Discharge by Impossibility of Performance
 - 1. In General
 - 2. Impossibility Known to Both Parties at Time of Contracting
 - 3. Impossibility at Time of Contracting Not Known to Either Party
 - 4. Impossibility at Time of Contracting Known to One Party Only
 - 5. Subsequent Impossibility of Performance
 - a. In General
 - b. Impossibility Created by Law
 - c. Existence or Capacity of Specific Person or Thing
 - 6. Impossibility in Case of Alternative Promises
- E. Discharge by Operation of Law
 - 1. In General
 - 2. Merger
 - 3. Alteration of Written Instrument
 - 4. Discharge in Bankruptcy
- F. Discharge by Breach
 - 1. In General
 - 2. Modes of Discharge by Breach
 - 3. Renunciation of Liability
 - a. Before Performance Is Due
 - (i) In General
 - (ii) Limitations to Rule
 - (A) Renunciation Must Be Entire
 - (B) Must Be Distinct and Unequivocal
 - (C) Contract Must Be Bilateral
 - (D) Renunciation May Be Rejected
 - (E) Renouncing Party Cannot Force Acceptance

- (7) Other Party Cannot Proceed and Complete Contract
 - b. Renunciation of Liability in Course of Performance
- 4. Impossibility of Performance Created by Party
- 5. Discharge by Failure to Perform
 - a. In General
 - b. When Promises Are Dependent and When Independent
 - (i) In General
 - (ii) Independent Promises
 - (iii) Dependent and Conditional Promises
 - c. Part-Performance of Conditions Precedent
 - d. Performance of Conditions Precedent Waived or Discharged
 - (i) In General
 - (ii) Acts Not Constituting a Waiver
 - (iii) Party Disabling Himself From Performing
 - e. Alternative Promises and Election
 - f. Divisible Promises
 - (i) In General
 - (ii) Repudiation of Contract
 - (iii) Express Provision For Discharge
 - g. Subsidiary Promises

X. JOINT AND SEVERAL CONTRACTS

- A. The Different Kinds of Promises
 - 1. In General
 - 2. Promises on One Side Only
 - 3. Promises on Both Sides
- B. Distinction Between Rights and Obligations
- C. Several Contracts
 - 1. Promisors
 - 2. Promisees
 - 3. Survivorship
 - 4. Joint Action Will Not Lie
- D. Joint Contracts
 - 1. Promisors
 - a. In General
 - b. Survivorship
 - c. Effect of Release
 - d. Effect of Judgment
 - e. Suit Must Be Against All
 - 2. Promisees
 - a. In General

- b. Survivorship
 - c. Payment or Release
- E. Joint and Several Contracts**
 - 1. Promisors
 - a. In General
 - b. Union of Joint and Several Liabilities
 - c. Liable Altogether or Singly
 - d. Both Remedies Available Until Satisfaction
 - 2. Promisees
- F. Construction of Such Contracts**
 - 1. Intention of Parties
 - 2. Presumption That Promises Are Joint
 - 3. Promisor's Liability Governed by Intent
 - 4. Promisee's Rights Governed by Interest
 - a. In General
 - b. Baron Parke's Rule of Interest
 - c. Legal Interest
 - d. Higher Interest
 - 5. Singular and Plural Number
 - 6. Several Promises
 - 7. Joint Promises
 - 8. Joint and Several Promises



